

Calendar No. 633

109TH CONGRESS
2^D SESSION

S. 3929

To authorize military commissions to bring terrorists to justice, to strengthen and modernize terrorist surveillance capabilities, and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 22, 2006

Mr. McCONNELL (for himself and Mr. FRIST) introduced the following bill; which was read the first time pursuant to the order of September 21, 2006, as modified on September 22, 2006

SEPTEMBER 25, 2006

Read the second time and placed on the calendar

A BILL

To authorize military commissions to bring terrorists to justice, to strengthen and modernize terrorist surveillance capabilities, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

TITLE I—MILITARY COMMISSIONS

SEC. 101. SHORT TITLE.

This title may be cited as the “Military Commissions Act of 2006”.

SEC. 102. FINDINGS.

Congress makes the following findings:

(1) The Constitution of the United States grants to Congress the power “To define and punish ... Offenses against the Law of Nations”, as well as the power “To declare War ... To raise and support Armies ... [and] To provide and maintain a Navy”.

(2) The military commission is the traditional tribunal for the trial of persons engaged in hostilities for violations of the law of war.

(3) Congress has, in the past, both authorized the use of military commission by statute and recognized the existence and authority of military commissions.

(4) Military commissions have been convened both by the President and by military commanders in the field to try offenses against the law of war.

(5) It is in the national interest for Congress to exercise its authority under the Constitution to enact legislation authorizing and regulating the use of

1 military commissions to try and punish violations of
2 the law of war.

3 **SEC. 103. AUTHORIZATION FOR MILITARY COMMISSIONS.**

4 (a) IN GENERAL.—The President is authorized to es-
5 tablish military commissions for the trial of alien unlawful
6 enemy combatants engaged in hostilities against the
7 United States for violations of the law of war and other
8 offenses specifically made triable by military commission
9 as provided in chapter 47 of title 10, United States Code,
10 and chapter 47A of title 10, United States Code (as en-
11 acted by this Act).

12 (b) CONSTRUCTION.—The authority in subsection (a)
13 may not be construed to alter or limit the authority of
14 the President under the Constitution and laws of the
15 United States to establish military commissions for areas
16 declared to be under martial law or in occupied territories
17 should circumstances so require.

18 (c) SCOPE OF PUNISHMENT AUTHORITY.—A military
19 commission established pursuant to subsection (a) shall
20 have authority to impose upon any person found guilty
21 under a proceeding under chapter 47A of title 10, United
22 States Code (as so enacted), a sentence that is appropriate
23 for the offense or offenses for which there is a finding
24 of guilt, including a sentence of death if authorized under
25 such chapter, imprisonment for life or a term of years,

1 payment of a fine or restitution, or such other lawful pun-
2 ishment or condition of punishment as the military com-
3 mission shall direct.

4 (d) EXECUTION OF PUNISHMENT.—The Secretary of
5 Defense is authorized to carry out a sentence of punish-
6 ment imposed by a military commission established pursu-
7 ant to subsection (a) in accordance with such procedures
8 as the Secretary may prescribe.

9 (e) ANNUAL REPORT ON TRIALS BY MILITARY COM-
10 MISSIONS.—

11 (1) ANNUAL REPORT REQUIRED.—Not later
12 than December 31 each year, the Secretary of De-
13 fense shall submit to the Committees on Armed
14 Services of the Senate and the House of Representa-
15 tives a report on any trials conducted by military
16 commissions established pursuant to subsection (a)
17 during such year.

18 (2) FORM.—Each report under this subsection
19 shall be submitted in unclassified form, but may in-
20 clude a classified annex.

21 **SEC. 104. MILITARY COMMISSIONS.**

22 (a) MILITARY COMMISSIONS.—

23 (1) IN GENERAL.—Subtitle A of title 10,
24 United States Code, is amended by inserting after
25 chapter 47 the following new chapter:

1 **“CHAPTER 47A—MILITARY COMMISSIONS**

| | |
|--------------------------------------------------------------------|--------|
| “SUBCHAPTER | Sec. |
| “I. General Provisions | 948a. |
| “II. Composition of Military Commissions | 948h. |
| “III. Pre-Trial Procedure | 948q. |
| “IV. Trial Procedure | 949a. |
| “V. Sentences | 949s. |
| “VI. Post-Trial Procedure and Review of Military Commissions | 950a. |
| “VII. Punitive Matters | 950aa. |

2 **“SUBCHAPTER I—GENERAL PROVISIONS**

| |
|-------------------------------------------------|
| “Sec. |
| “948a. Definitions. |
| “948b. Military commissions generally. |
| “948c. Persons subject to military commissions. |
| “948d. Jurisdiction of military commissions. |

3 **“§ 948a. Definitions**

4 “In this chapter:

5 “(1) ALIEN.—The term ‘alien’ means an indi-
6 vidual who is not a citizen of the United States.

7 “(2) CLASSIFIED INFORMATION.—The term
8 ‘classified information’ means the following:

9 “(A) Any information or material that has
10 been determined by the United States Govern-
11 ment pursuant to statute, Executive order, or
12 regulation to require protection against unau-
13 thorized disclosure for reasons of national secu-
14 rity.

15 “(B) Any restricted data, as that term is
16 defined in section 11 y. of the Atomic Energy
17 Act of 1954 (42 U.S.C. 2014(y)).

1 “(3) **LAWFUL ENEMY COMBATANT.**—The term
 2 ‘lawful enemy combatant’ means an individual who
 3 is—

4 “(A) a member of the regular forces of a
 5 State party engaged in hostilities against the
 6 United States;

7 “(B) a member of a militia, volunteer
 8 corps, or organized resistance movement belong-
 9 ing to a State party engaged in such hostilities,
 10 which are under responsible command, wear a
 11 fixed distinctive sign recognizable at a distance,
 12 carry their arms openly, and abide by the law
 13 of war; or

14 “(C) a member of a regular armed force
 15 who professes allegiance to a government en-
 16 gaged in such hostilities, but not recognized by
 17 the United States.

18 “(4) **UNLAWFUL ENEMY COMBATANT.**—The
 19 term ‘unlawful enemy combatant’ means an indi-
 20 vidual engaged in hostilities against the United
 21 States who is not a lawful enemy combatant.

22 **“§ 948b. Military commissions generally**

23 “(a) **PURPOSE.**—This chapter establishes procedures
 24 governing the use of military commissions to try alien un-
 25 lawful enemy combatants engaged in hostilities against the

1 United States for violations of the law of war and other
2 offenses triable by military commission.

3 “(b) CONSTRUCTION OF PROVISIONS.—The proce-
4 dures for military commissions set forth in this chapter
5 are based upon the procedures for trial by general courts-
6 martial under chapter 47 of this title (the Uniform Code
7 of Military Justice). Chapter 47 of this title does not, by
8 its terms, apply to trial by military commission except as
9 specifically provided therein or in this chapter, and many
10 of the provisions of chapter 47 of this title are by their
11 terms inapplicable to military commissions. The judicial
12 construction and application of chapter 47 of this title is
13 therefore not binding on military commissions established
14 under this chapter.

15 “(c) INAPPLICABILITY OF CERTAIN PROVISIONS.—
16 (1) The following provisions of this title shall not apply
17 to trial by military commission under this chapter:

18 “(A) Section 810 (article 10 of the Uniform
19 Code of Military Justice), relating to speedy trial,
20 including any rule of courts-martial relating to
21 speedy trial.

22 “(B) Sections 831(a), (b), and (d) (articles
23 31(a), (b), and (d) of the Uniform Code of Military
24 Justice), relating to compulsory self-incrimination.

1 “(C) Section 832 (article 32 of the Uniform
2 Code of Military Justice), relating to pretrial inves-
3 tigation.

4 “(2) Other provisions of chapter 47 of this title shall
5 apply to trial by military commission under this chapter
6 only to the extent provided by the terms of such provisions
7 or by this chapter.

8 “(d) STATUS OF MILITARY COMMISSIONS UNDER
9 COMMON ARTICLE 3.—A military commission established
10 under this chapter is a regularly constituted court, afford-
11 ing all the necessary ‘judicial guarantees which are recog-
12 nized as indispensable by civilized peoples’ for purposes
13 of common Article 3 of the Geneva Conventions.

14 “(e) TREATMENT OF RULINGS AND PRECEDENTS.—
15 The findings, holdings, interpretations, and other prece-
16 dents of military commissions under this chapter may not
17 be introduced or considered in any hearing, trial, or other
18 proceeding of a court-martial convened under chapter 47
19 of this title. The findings, holdings, interpretations, and
20 other precedents of military commissions under this chap-
21 ter may not form the basis of any holding, decision, or
22 other determination of a court-martial convened under
23 that chapter.

24 “(f) GENEVA CONVENTIONS NOT ESTABLISHING
25 SOURCE OF RIGHTS.—No alien enemy unlawful combat-

1 ant subject to trial by military commission under this
 2 chapter may invoke the Geneva Conventions as a source
 3 of rights at his trial by military commission.

4 **“§ 948c. Persons subject to military commissions**

5 “Any alien unlawful enemy combatant engaged in
 6 hostilities or having supported hostilities against the
 7 United States is subject to trial by military commission
 8 as set forth in this chapter.

9 **“§ 948d. Jurisdiction of military commissions**

10 “(a) JURISDICTION.—A military commission under
 11 this chapter shall have jurisdiction to try any offense made
 12 punishable by this chapter, sections 904 and 906 of this
 13 title (articles 104 and 106 of the Uniform Code of Military
 14 Justice), or the law of war when committed by an alien
 15 unlawful enemy combatant before, on, or after September
 16 11, 2001.

17 “(b) LAWFUL ENEMY COMBATANTS.—Military com-
 18 missions under this chapter shall not have jurisdiction
 19 over lawful enemy combatants. Lawful enemy combatants
 20 who violate the law of war are subject to chapter 47 of
 21 this title. Courts-martial established under that chapter
 22 shall have jurisdiction to try a lawful enemy combatant
 23 for any offense made punishable under this chapter.

24 “(c) PUNISHMENTS.—A miliary commission under
 25 this chapter may, under such limitations as the President

1 may prescribe, adjudge any punishment not forbidden by
 2 this chapter, including the penalty of death when author-
 3 ized under this chapter, chapter 47 of this title, or the
 4 law of war.

5 “SUBCHAPTER II—COMPOSITION OF MILITARY
 6 COMMISSIONS

“Sec.

“948h. Who may convene military commissions.

“948i. Who may serve on military commissions.

“948j. Military judge of a military commission.

“948k. Detail of trial counsel and defense counsel.

“948l. Detail or employment of reporters and interpreters.

“948m. Number of members; excuse of members; absent and additional mem-
 bers.

7 **“§ 948h. Who may convene military commissions**

8 “Military commissions under this chapter may be
 9 convened by the Secretary of Defense or by any officer
 10 or official of the United States designated by the Secretary
 11 for that purpose.

12 **“§ 948i. Who may serve on military commissions**

13 “(a) IN GENERAL.—Any commissioned officer of the
 14 armed forces on active duty is eligible to serve on a mili-
 15 tary commission under this chapter, including commis-
 16 sioned officers of the reserve components of the armed
 17 forces on active duty, commissioned officers of the Na-
 18 tional Guard on active duty in Federal service, or retired
 19 commissioned officers recalled to active duty.

20 “(b) DETAIL OF MEMBERS.—When convening a mili-
 21 tary commission under this chapter, the convening author-

1 ity shall detail as members thereof such members of the
 2 armed forces eligible under subsection (a) who, as in the
 3 opinion of the convening authority, are best qualified for
 4 the duty by reason of age, education, training, experience,
 5 length of service, and judicial temperament. No member
 6 of an armed force is eligible to serve as a member of a
 7 military commission when such member is the accuser or
 8 a witness for the prosecution or has acted as an investi-
 9 gator or counsel in the same case.

10 “(c) EXCUSE OF MEMBERS.—Before a military com-
 11 mission under this chapter is assembled for the trial of
 12 a case, the convening authority may excuse a member
 13 from participating in the case.

14 **“§ 948j. Military judge of a military commission**

15 “(a) DETAIL OF MILITARY JUDGE.—A military judge
 16 shall be detailed to each military commission under this
 17 chapter. The Secretary of Defense shall prescribe regula-
 18 tions providing for the manner in which military judges
 19 are so detailed to military commissions. The military judge
 20 shall preside over each military commission to which he
 21 has been detailed.

22 “(b) ELIGIBILITY.—A military judge shall be a com-
 23 missioned officer of the armed forces who is a member
 24 of the bar of a Federal court, or a member of the bar
 25 of the highest court of a State, and who is certified to

1 be qualified for duty under section 826 of this title (article
2 26 of the Uniform Code of Military Justice) as a military
3 judge in general courts-martial by the Judge Advocate
4 General of the armed force of which such military judge
5 is a member.

6 “(c) INELIGIBILITY OF CERTAIN INDIVIDUALS.—No
7 person is eligible to act as military judge in a case of a
8 military commission under this chapter if he is the accuser
9 or a witness or has acted as investigator or a counsel in
10 the same case.

11 “(d) CONSULTATION WITH MEMBERS; INELIGI-
12 BILITY TO VOTE.—A military judge detailed to a military
13 commission under this chapter may not consult with the
14 members except in the presence of the accused (except as
15 otherwise provided in section 949d of this title), trial coun-
16 sel, and defense counsel, nor may he vote with the mem-
17 bers.

18 “(e) OTHER DUTIES.—A commissioned officer who
19 is certified to be qualified for duty as a military judge of
20 a military commission under this chapter may perform
21 such other duties as are assigned to him by or with the
22 approval of the Judge Advocate General of the armed
23 force of which such officer is a member or the designee
24 of such Judge Advocate General.

1 “(f) PROHIBITION ON EVALUATION OF FITNESS BY
 2 CONVENING AUTHORITY.—The convening authority of a
 3 military commission under this chapter shall not prepare
 4 or review any report concerning the effectiveness, fitness,
 5 or efficiency of a military judge detailed to the military
 6 commission which relates to his performance of duty as
 7 a military judge on the military commission.

8 **“§ 948k. Detail of trial counsel and defense counsel**

9 “(a) DETAIL OF COUNSEL GENERALLY.—(1) Trial
 10 counsel and military defense counsel shall be detailed for
 11 each military commission under this chapter.

12 “(2) Assistant trial counsel and assistant and asso-
 13 ciate defense counsel may be detailed for a military com-
 14 mission under this chapter.

15 “(3) Military defense counsel for a military commis-
 16 sion under this chapter shall be detailed as soon as prac-
 17 ticable after the swearing of charges.

18 “(4) The Secretary of Defense shall prescribe regula-
 19 tions providing for the manner in which trial counsel and
 20 military defense counsel are detailed for military commis-
 21 sions under this chapter and for the persons who are au-
 22 thorized to detail such counsel for such military commis-
 23 sions.

1 “(b) TRIAL COUNSEL.—Subject to subsection (e),
2 trial counsel detailed for a military commission under this
3 chapter must be—

4 “(1) a judge advocate (as that term is defined
5 in section 801 of this title (article 1 of the Uniform
6 Code of Military Justice)) who is—

7 “(A) a graduate of an accredited law
8 school or is a member of the bar of a Federal
9 court or of the highest court of a State; and

10 “(B) certified as competent to perform du-
11 ties as trial counsel before general courts-mar-
12 tial by the Judge Advocate General of the
13 armed force of which he is a member; or

14 “(2) a civilian who is—

15 “(A) a member of the bar of a Federal
16 court or of the highest court of a State; and

17 “(B) otherwise qualified to practice before
18 the military commission pursuant to regulations
19 prescribed by the Secretary of Defense.

20 “(c) MILITARY DEFENSE COUNSEL.—Subject to sub-
21 section (e), military defense counsel detailed for a military
22 commission under this chapter must be a judge advocate
23 (as so defined) who is—

1 “(1) a graduate of an accredited law school or
2 is a member of the bar of a Federal court or of the
3 highest court of a State; and

4 “(2) certified as competent to perform duties as
5 defense counsel before general courts-martial by the
6 Judge Advocate General of the armed force of which
7 he is a member.

8 “(d) CHIEF PROSECUTOR; CHIEF DEFENSE COUN-
9 SEL.—(1) The Chief Prosecutor in a military commission
10 under this chapter shall meet the requirements set forth
11 in subsection (b)(1).

12 “(2) The Chief Defense Counsel in a military com-
13 mission under this chapter shall meet the requirements set
14 forth in subsection (c)(1).

15 “(e) INELIGIBILITY OF CERTAIN INDIVIDUALS.—No
16 person who has acted as an investigator, military judge,
17 or member of a military commission under this chapter
18 in any case may act later as trial counsel or military de-
19 fense counsel in the same case. No person who has acted
20 for the prosecution before a military commission under
21 this chapter may act later in the same case for the de-
22 fense, nor may any person who has acted for the defense
23 before a military commission under this chapter act later
24 in the same case for the prosecution.

1 **“§ 948l. Detail or employment of reporters and inter-**
 2 **preters**

3 “(a) COURT REPORTERS.—Under such regulations
 4 as the Secretary of Defense may prescribe, the convening
 5 authority of a military commission under this chapter
 6 shall detail to or employ for the military commission quali-
 7 fied court reporters, who shall prepare a verbatim record
 8 of the proceedings of and testimony taken before the mili-
 9 tary commission.

10 “(b) INTERPRETERS.—Under such regulations as the
 11 Secretary of Defense may prescribe, the convening author-
 12 ity of a military commission under this chapter may detail
 13 to or employ for the military commission interpreters who
 14 shall interpret for the military commission, and, as nec-
 15 essary, for trial counsel and defense counsel for the mili-
 16 tary commission, and for the accused.

17 “(c) TRANSCRIPT; RECORD.—The transcript of a
 18 military commission under this chapter shall be under the
 19 control of the convening authority of the military commis-
 20 sion, who shall also be responsible for preparing the record
 21 of the proceedings of the military commission.

22 **“§ 948m. Number of members; excuse of members; ab-**
 23 **sent and additional members**

24 “(a) NUMBER OF MEMBERS.—(1) A military com-
 25 mission under this chapter shall, except as provided in
 26 paragraph (2), have at least five members.

1 “(2) In a case in which the accused before a military
2 commission under this chapter may be sentenced to a pen-
3 alty of death, the military commission shall have the num-
4 ber of members prescribed by section 949m(c) of this title.

5 “(b) EXCUSE OF MEMBERS.—No member of a mili-
6 tary commission under this chapter may be absent or ex-
7 cused after the military commission has been assembled
8 for the trial of a case unless excused—

9 “(1) as a result of challenge;

10 “(2) by the military judge for physical disability
11 or other good cause; or

12 “(3) by order of the convening authority for
13 good cause.

14 “(c) ABSENT AND ADDITIONAL MEMBERS.—When-
15 ever a military commission under this chapter is reduced
16 below the number of members required by subsection (a),
17 the trial may not proceed unless the convening authority
18 details new members sufficient to provide not less than
19 such number. The trial may proceed with the new mem-
20 bers present after the recorded evidence previously intro-
21 duced before the members has been read to the military
22 commission in the presence of the military judge, the ac-
23 cused (except as provided in section 949d of this title),
24 and counsel for both sides.

1 “SUBCHAPTER III—PRE-TRIAL PROCEDURE

“Sec.

“948q. Charges and specifications.

“948r. Compulsory self-incrimination prohibited; statements obtained by torture
or other methods of coercion.

“948s. Service of charges.

2 **“§ 948q. Charges and specifications**

3 “(a) CHARGES AND SPECIFICATIONS.—Charges and
4 specifications against an accused in a military commission
5 under this chapter shall be signed by a person subject to
6 chapter 47 of this title under oath before a commissioned
7 officer of the armed forces authorized to administer oaths
8 and shall state—

9 “(1) that the signer has personal knowledge of,
10 or reason to believe, the matters set forth therein;
11 and

12 “(2) that they are true in fact to the best of his
13 knowledge and belief.

14 “(b) NOTICE TO ACCUSED.—Upon the swearing of
15 the charges and specifications in accordance with sub-
16 section (a), the accused shall be informed of the charges
17 and specifications against him as soon as practicable.

18 **“§ 948r. Compulsory self-incrimination prohibited;**
19 **statements obtained by torture or other**
20 **methods of coercion**

21 “(a) IN GENERAL.—No person shall be required to
22 testify against himself at a proceeding of a military com-
23 mission under this chapter.

1 “(b) STATEMENTS OBTAINED BY TORTURE.—A
2 statement obtained by use of torture shall not be admis-
3 sible in a military commission under this chapter, except
4 against a person accused of torture as evidence the state-
5 ment was made.

6 “(c) STATEMENTS OBTAINED BEFORE ENACTMENT
7 OF DETAINEE TREATMENT ACT OF 2005.—A statement
8 obtained before December 30, 2005 (the date of the enact-
9 ment of the Detainee Treatment Act of 2005), in which
10 the degree of coercion is disputed may be admitted only
11 if the military judge finds that—

12 “(1) the totality of the circumstances renders it
13 reliable and possessing sufficient probative value;
14 and

15 “(2) the interests of justice would best be
16 served by admission of the statement into evidence.

17 “(d) STATEMENTS OBTAINED AFTER ENACTMENT
18 OF DETAINEE TREATMENT ACT OF 2005.—A statement
19 obtained on or after December 30, 2005 (the date of the
20 enactment of the Detainee Treatment Act of 2005), in
21 which the degree of coercion is disputed may be admitted
22 only if the military judge finds that—

23 “(1) the totality of the circumstances renders it
24 reliable and possessing sufficient probative value;

1 “(2) the interests of justice would best be
 2 served by admission of the statement into evidence;
 3 and

4 “(3) the interrogation methods used to obtain
 5 the statement do not violate the cruel, unusual, or
 6 inhumane treatment or punishment prohibited by
 7 the Fifth, Eighth, and 14th Amendments to the
 8 United States Constitution.

9 **“§ 948s. Service of charges**

10 “The trial counsel assigned to a case before a military
 11 commission under this chapter shall cause to be served
 12 upon the accused and military defense counsel a copy of
 13 the charges upon which trial is to be had in English and,
 14 if appropriate, in another language that the accused un-
 15 derstands, sufficiently in advance of trial to prepare a de-
 16 fense.

17 “SUBCHAPTER IV—TRIAL PROCEDURE

“Sec.

“949a. Rules.

“949b. Unlawfully influencing action of military commission.

“949c. Duties of trial counsel and defense counsel.

“949d. Sessions.

“949e. Continuances.

“949f. Challenges.

“949g. Oaths.

“949h. Former jeopardy.

“949i. Pleas of the accused.

“949j. Opportunity to obtain witnesses and other evidence.

“949k. Defense of lack of mental responsibility.

“949l. Voting and rulings.

“949m. Number of votes required.

“949n. Military commission to announce action.

“949o. Record of trial.

1 **“§ 949a. Rules**

2 “(a) PROCEDURES AND RULES OF EVIDENCE.—Pre-
3 trial, trial, and post-trial procedures, including elements
4 and modes of proof, for cases triable by military commis-
5 sion under this chapter may be prescribed by the Secretary
6 of Defense. Such procedures may not be contrary to or
7 inconsistent with this chapter. Except as otherwise pro-
8 vided in this chapter or chapter 47 of this title, the proce-
9 dures and rules of evidence applicable in trials by general
10 courts-martial of the United States shall apply in trials
11 by military commission under this chapter.

12 “(b) EXCEPTIONS.—(1) The Secretary of Defense, in
13 consultation with the Attorney General, may make such
14 exceptions in the applicability in trials by military commis-
15 sion under this chapter from the procedures and rules of
16 evidence otherwise applicable in general courts-martial as
17 may be required by the unique circumstances of the con-
18 duct of military and intelligence operations during hos-
19 tilities or by other practical need.

20 “(2) Notwithstanding any exceptions authorized by
21 paragraph (1), the procedures and rules of evidence in
22 trials by military commission under this chapter shall in-
23 clude, at a minimum, the following rights:

24 “(A) To examine and respond to all evidence
25 considered by the military commission on the issue
26 of guilt or innocence and for sentencing.

1 “(B) To be present at all sessions of the mili-
2 tary commission (other than those for deliberations
3 or voting), except when excluded under section 949d
4 of this title.

5 “(C) To the assistance of counsel.

6 “(D) To self-representation, if the accused
7 knowingly and competently waives the assistance of
8 counsel, subject to the provisions of paragraph (4).

9 “(E) To the suppression of evidence that is not
10 reliable or probative.

11 “(F) To the suppression of evidence the pro-
12 bative value of which is substantially outweighed
13 by—

14 “(i) the danger of unfair prejudice, confu-
15 sion of the issues, or misleading the members;
16 or

17 “(ii) considerations of undue delay, waste
18 of time, or needless presentation of cumulative
19 evidence.

20 “(3) In making exceptions in the applicability in
21 trials by military commission under this chapter from the
22 procedures and rules otherwise applicable in general
23 courts-martial, the Secretary of Defense may provide the
24 following:

1 “(A) Evidence seized outside the United States
2 shall not be excluded from trial by military commis-
3 sion on the grounds that the evidence was not seized
4 pursuant to a search warrant or authorization.

5 “(B) A statement of the accused that is other-
6 wise admissible shall not be excluded from trial by
7 military commission on grounds of alleged coercion
8 or compulsory self-incrimination so long as the evi-
9 dence complies with the provisions of section 948r of
10 this title.

11 “(C) Evidence shall be admitted as authentic so
12 long as—

13 “(i) the military judge of the military com-
14 mission determines that there is sufficient evi-
15 dence that the evidence is what it is claimed to
16 be; and

17 “(ii) the military judge instructs the mem-
18 bers that they may consider any issue as to au-
19 thentication or identification of evidence in de-
20 termining the weight, if any, to be given to the
21 evidence.

22 “(D)(i) Except as provided in clause (ii), hear-
23 say evidence not otherwise admissible under the
24 rules of evidence applicable in trial by general
25 courts-martial may be admitted in a trial by military

1 commission if the proponent of the evidence makes
2 known to the adverse party, sufficiently in advance
3 to provide the adverse party with a fair opportunity
4 to meet the evidence, the intention of the proponent
5 to offer the evidence, and the particulars of the evi-
6 dence (including information on the general cir-
7 cumstances under which the evidence was obtained).
8 The disclosure of evidence under this clause is sub-
9 ject to the requirements and limitations applicable to
10 the disclosure of classified information in section
11 949j(b) of this title.

12 “(ii) Hearsay evidence not otherwise admissible
13 under the rules of evidence applicable in trial by
14 general courts-martial shall not be admitted in a
15 trial by military commission if the party opposing
16 the admission of the evidence demonstrates that the
17 evidence is unreliable or lacking in probative value.

18 “(4)(A) The accused in a military commission under
19 this chapter who exercises the right to self-representation
20 under paragraph (2)(D) shall conform his deportment and
21 the conduct of the defense to the rules of evidence, proce-
22 dure, and decorum applicable to trials by military commis-
23 sion.

24 “(B) Failure of the accused to conform to the rules
25 described in subparagraph (A) may result in a partial or

1 total revocation by the military judge of the right of self-
 2 representation under paragraph (2)(D). In such case, the
 3 detailed defense counsel of the accused or an appropriately
 4 authorized civilian counsel shall perform the functions nec-
 5 essary for the defense.

6 “(c) DELEGATION OF AUTHORITY TO PRESCRIBE
 7 REGULATIONS.—The Secretary of Defense may delegate
 8 the authority of the Secretary to prescribe regulations
 9 under this chapter.

10 **“§ 949b. Unlawfully influencing action of military**
 11 **commission**

12 “(a) IN GENERAL.—(1) No authority convening a
 13 military commission under this chapter may censure, rep-
 14 rimand, or admonish the military commission, or any
 15 member, military judge, or counsel thereof, with respect
 16 to the findings or sentence adjudged by the military com-
 17 mission, or with respect to any other exercises of its or
 18 their functions in the conduct of the proceedings.

19 “(2) No person may attempt to coerce or, by any un-
 20 authorized means, influence—

21 “(A) the action of a military commission under
 22 this chapter, or any member thereof, in reaching the
 23 findings or sentence in any case;

1 “(B) the action of any convening, approving, or
2 reviewing authority with respect to their judicial
3 acts; or

4 “(C) the exercise of professional judgment by
5 trial counsel or defense counsel.

6 “(3) The provisions of this subsection shall not apply
7 with respect to—

8 “(A) general instructional or informational
9 courses in military justice if such courses are de-
10 signed solely for the purpose of instructing members
11 of a command in the substantive and procedural as-
12 pects of military commissions; or

13 “(B) statements and instructions given in open
14 proceedings by a military judge or counsel.

15 “(b) PROHIBITION ON CONSIDERATION OF ACTIONS
16 ON COMMISSION IN EVALUATION OF FITNESS.—In the
17 preparation of an effectiveness, fitness, or efficiency report
18 or any other report or document used in whole or in part
19 for the purpose of determining whether a commissioned
20 officer of the armed forces is qualified to be advanced in
21 grade, or in determining the assignment or transfer of any
22 such officer or whether any such officer should be retained
23 on active duty, no person may—

1 “(1) consider or evaluate the performance of
2 duty of any member of a military commission under
3 this chapter; or

4 “(2) give a less favorable rating or evaluation
5 to any commissioned officer because of the zeal with
6 which such officer, in acting as counsel, represented
7 any accused before a military commission under this
8 chapter.

9 **“§ 949c. Duties of trial counsel and defense counsel**

10 “(a) TRIAL COUNSEL.—The trial counsel of a mili-
11 tary commission under this chapter shall prosecute in the
12 name of the United States.

13 “(b) DEFENSE COUNSEL.—(1) The accused shall be
14 represented in his defense before a military commission
15 under this chapter as provided in this subsection.

16 “(2) The accused shall be represented by military
17 counsel detailed under section 948k of this title.

18 “(3) The accused may be represented by civilian
19 counsel if retained by the accused, provided that such civil-
20 ian counsel—

21 “(A) is a United States citizen;

22 “(B) is admitted to the practice of law in a
23 State, district, or possession of the United States, or
24 before a Federal court;

1 “(C) has not been the subject of any sanction
2 of disciplinary action by any court, bar, or other
3 competent governmental authority for relevant mis-
4 conduct;

5 “(D) has been determined to be eligible for ac-
6 cess to information classified at the level Secret or
7 higher; and

8 “(E) has signed a written agreement to comply
9 with all applicable regulations or instructions for
10 counsel, including any rules of court for conduct
11 during the proceedings.

12 “(4) If the accused is represented by civilian counsel,
13 military counsel detailed shall act as associate counsel.

14 “(5) The accused is not entitled to be represented by
15 more than one military counsel. However, the person au-
16 thorized under regulations prescribed under section 948k
17 of this title to detail counsel, in such person’s sole discre-
18 tion, may detail additional military counsel to represent
19 the accused.

20 “(6) Defense counsel may cross-examine each witness
21 for the prosecution who testifies before a military commis-
22 sion under this chapter.

23 **“§ 949d. Sessions**

24 “(a) SESSIONS WITHOUT PRESENCE OF MEM-
25 BERS.—(1) At any time after the service of charges which

1 have been referred for trial by military commission under
2 this chapter, the military judge may call the military com-
3 mission into session without the presence of the members
4 for the purpose of—

5 “(A) hearing and determining motions raising
6 defenses or objections which are capable of deter-
7 mination without trial of the issues raised by a plea
8 of not guilty;

9 “(B) hearing and ruling upon any matter which
10 may be ruled upon by the military judge under this
11 chapter, whether or not the matter is appropriate for
12 later consideration or decision by the members;

13 “(C) if permitted by regulations prescribed by
14 the Secretary of Defense, receiving the pleas of the
15 accused; and

16 “(D) performing any other procedural function
17 which may be performed by the military judge under
18 this chapter or under rules prescribed pursuant to
19 section 949a of this title and which does not require
20 the presence of the members.

21 “(2) Except as provided in subsections (b), (c), and
22 (d), any proceedings under paragraph (1) shall be con-
23 ducted in the presence of the accused, defense counsel, and
24 trial counsel, and shall be made part of the record.

1 “(b) DELIBERATION OR VOTE OF MEMBERS.—When
2 the members of a military commission under this chapter
3 deliberate or vote, only the members may be present.

4 “(c) CLOSURE OF PROCEEDINGS.—(1) The military
5 judge may close to the public all or part of the proceedings
6 of a military commission under this chapter.

7 “(2) The military judge may close to the public all
8 or a portion of the proceedings under paragraph (1) only
9 upon making a specific finding that such closure is nec-
10 essary to—

11 “(A) protect information the disclosure of which
12 could reasonably be expected to cause damage to the
13 national security, including intelligence or law en-
14 forcement sources, methods, or activities; or

15 “(B) ensure the physical safety of individuals.

16 “(3) A finding under paragraph (2) may be based
17 upon a presentation, including a presentation ex parte or
18 in camera, by either trial counsel or defense counsel.

19 “(d) EXCLUSION OF ACCUSED FROM CERTAIN PRO-
20 CEEDINGS.—The military judge may exclude the accused
21 from any portion of a proceeding upon a determination
22 that, after being warned by the military judge, the accused
23 persists in conduct that justifies exclusion from the court-
24 room—

1 “(1) to ensure the physical safety of individuals;
2 or

3 “(2) to prevent disruption of the proceedings by
4 the accused.

5 “(e) PROTECTION OF CLASSIFIED INFORMATION.—

6 “(1) NATIONAL SECURITY PRIVILEGE.—(A)
7 Classified information shall be protected and is privi-
8 leged from disclosure if disclosure would be detri-
9 mental to the national security. This rule applies to
10 all stages of the proceedings of military commissions
11 under this chapter.

12 “(B) The privilege referred to in subparagraph
13 (A) may be claimed by the head of the executive or
14 military department or government agency con-
15 cerned based on a finding by the head of that de-
16 partment or agency that—

17 “(i) the information is properly classified;
18 and

19 “(ii) disclosure would be detrimental to the
20 national security.

21 “(C) A person who may claim the privilege re-
22 ferred to in subparagraph (A) may authorize a rep-
23 resentative, witness, or trial counsel to claim the
24 privilege and make the finding described in subpara-
25 graph (B) on behalf of such person. The authority

of the representative, witness, or trial counsel to do so is presumed in the absence of evidence to the contrary.

“(2) INTRODUCTION OF CLASSIFIED INFORMATION.—

“(A) ALTERNATIVES TO DISCLOSURE.—To protect classified information from disclosure, the military judge, upon motion of trial counsel, shall authorize, to the extent practicable—

“(i) the deletion of specified items of classified information from documents to be introduced as evidence before the military commission;

“(ii) the substitution of a portion or summary of the information for such classified documents; or

“(iii) the substitution of a statement of relevant facts that the classified information would tend to prove.

“(B) PROTECTION OF SOURCES, METHODS, OR ACTIVITIES.—The military judge, upon motion of trial counsel, shall permit trial counsel to introduce otherwise admissible evidence before the military commission, while protecting from disclosure the sources, methods, or activi-

ties by which the United States acquired the evidence if the military judge finds that (i) the sources, methods, or activities by which the United States acquired the evidence are classified, and (ii) the evidence is reliable. The military judge may require trial counsel to present to the military commission and the defense, to the extent practicable and consistent with national security, an unclassified summary of the sources, methods, or activities by which the United States acquired the evidence.

“(C) ASSERTION OF NATIONAL SECURITY PRIVILEGE AT TRIAL.—During the examination of any witness, trial counsel may object to any question, line of inquiry, or motion to admit evidence that would require the disclosure of classified information. Following such an objection, the military judge shall take suitable action to safeguard such classified information. Such action may include the review of trial counsel’s claim of privilege by the military judge in camera and on an ex parte basis, and the delay of proceedings to permit trial counsel to consult with the department or agency concerned as to

1 whether the national security privilege should
2 be asserted.

3 “(3) CONSIDERATION OF PRIVILEGE AND RE-
4 LATED MATERIALS.—A claim of privilege under this
5 subsection, and any materials submitted in support
6 thereof, shall, upon request of the Government, be
7 considered by the military judge in camera and shall
8 not be disclosed to the accused.

9 “(4) ADDITIONAL REGULATIONS.—The Sec-
10 retary of Defense may prescribe additional regula-
11 tions, consistent with this subsection, for the use
12 and protection of classified information during pro-
13 ceedings of military commissions under this chapter.
14 A report on any regulations so prescribed, or modi-
15 fied, shall be submitted to the Committees on Armed
16 Services of the Senate and the House of Representa-
17 tives not later than 60 days before the date on which
18 such regulations or modifications, as the case may
19 be, go into effect.

20 **“§ 949e. Continuances**

21 “The military judge in a military commission under
22 this chapter may, for reasonable cause, grant a continu-
23 ance to any party for such time, and as often, as may
24 appear to be just.

1 **“§ 949f. Challenges**

2 “(a) CHALLENGES AUTHORIZED.—The military
3 judge and members of a military commission under this
4 chapter may be challenged by the accused or trial counsel
5 for cause stated to the military commission. The military
6 judge shall determine the relevance and validity of chal-
7 lenges for cause, and may not receive a challenge to more
8 than one person at a time. Challenges by trial counsel
9 shall ordinarily be presented and decided before those by
10 the accused are offered.

11 “(b) PEREMPTORY CHALLENGES.—The accused and
12 trial counsel are each entitled to one peremptory challenge,
13 but the military judge may not be challenged except for
14 cause.

15 “(c) CHALLENGES AGAINST ADDITIONAL MEM-
16 BERS.—Whenever additional members are detailed to a
17 military commission under this chapter, and after any
18 challenges for cause against such additional members are
19 presented and decided, the accused and trial counsel are
20 each entitled to one peremptory challenge against mem-
21 bers not previously subject to peremptory challenge.

22 **“§ 949g. Oaths**

23 “(a) IN GENERAL.—(1) Before performing their re-
24 spective duties in a military commission under this chap-
25 ter, military judges, members, trial counsel, defense coun-

1 sel, reporters, and interpreters shall take an oath to per-
 2 form their duties faithfully.

3 “(2) The form of the oath required by paragraph (1),
 4 the time and place of the taking thereof, the manner of
 5 recording thereof, and whether the oath shall be taken for
 6 all cases in which duties are to be performed or for a par-
 7 ticular case, shall be as provided in regulations prescribed
 8 by the Secretary of Defense. The regulations may provide
 9 that—

10 “(A) an oath to perform faithfully duties as a
 11 military judge, trial counsel, or defense counsel may
 12 be taken at any time by any judge advocate or other
 13 person certified to be qualified or competent for the
 14 duty; and

15 “(B) if such an oath is taken, such oath need
 16 not again be taken at the time the judge advocate
 17 or other person is detailed to that duty.

18 “(b) WITNESSES.—Each witness before a military
 19 commission under this chapter shall be examined on oath.

20 “(c) OATH DEFINED.—In this section, the term
 21 ‘oath’ includes an affirmation.

22 **“§ 949h. Former jeopardy**

23 “(a) IN GENERAL.—No person may, without his con-
 24 sent, be tried by a military commission under this chapter
 25 a second time for the same offense.

1 “(b) SCOPE OF TRIAL.—No proceeding in which the
 2 accused has been found guilty by military commission
 3 under this chapter upon any charge or specification is a
 4 trial in the sense of this section until the finding of guilty
 5 has become final after review of the case has been fully
 6 completed.

7 **“§ 949i. Pleas of the accused**

8 “(a) PLEA OF NOT GUILTY.—If an accused in a mili-
 9 tary commission under this chapter after a plea of guilty
 10 sets up matter inconsistent with the plea, or if it appears
 11 that the accused has entered the plea of guilty through
 12 lack of understanding of its meaning and effect, or if the
 13 accused fails or refuses to plead, a plea of not guilty shall
 14 be entered in the record, and the military commission shall
 15 proceed as though the accused had pleaded not guilty.

16 “(b) FINDING OF GUILT AFTER GUILTY PLEA.—
 17 With respect to any charge or specification to which a plea
 18 of guilty has been made by the accused in a military com-
 19 mission under this chapter and accepted by the military
 20 judge, a finding of guilty of the charge or specification
 21 may be entered immediately without a vote. The finding
 22 shall constitute the finding of the military commission un-
 23 less the plea of guilty is withdrawn prior to announcement
 24 of the sentence, in which event the proceedings shall con-
 25 tinue as though the accused had pleaded not guilty.

1 **“§ 949j. Opportunity to obtain witnesses and other**
2 **evidence**

3 “(a) IN GENERAL.—(1) Defense counsel in a military
4 commission under this chapter shall have a reasonable op-
5 portunity to obtain witnesses and other evidence as pro-
6 vided in regulations prescribed by the Secretary of De-
7 fense.

8 “(2) Process issued in military commissions under
9 this chapter to compel witnesses to appear and testify and
10 to compel the production of other evidence—

11 “(A) shall be similar to that which courts of the
12 United States having criminal jurisdiction may law-
13 fully issue; and

14 “(B) shall run to any place where the United
15 States shall have jurisdiction thereof.

16 “(b) PROTECTION OF CLASSIFIED INFORMATION.—
17 (1) With respect to the discovery obligations of trial coun-
18 sel under this section, the military judge, upon motion of
19 trial counsel, shall authorize, to the extent practicable—

20 “(A) the deletion of specified items of classified
21 information from documents to be made available to
22 the accused;

23 “(B) the substitution of a portion or summary
24 of the information for such classified documents; or

1 “(C) the substitution of a statement admitting
2 relevant facts that the classified information would
3 tend prove.

4 “(2) The military judge, upon motion of trial counsel,
5 shall authorize trial counsel, in the course of complying
6 with discovery obligations under this section, to protect
7 from disclosure the sources, methods, or activities by
8 which the United States acquired evidence if the military
9 judge finds that the sources, methods, or activities by
10 which the United States acquired such evidence are classi-
11 fied. The military judge may require trial counsel to pro-
12 vide, to the extent practicable, an unclassified summary
13 of the sources, methods, or activities by which the United
14 States acquired such evidence.

15 “(c) EXCULPATORY EVIDENCE.—(1) As soon as
16 practicable, trial counsel shall disclose to the defense the
17 existence of any evidence known to trial counsel that rea-
18 sonably tends to exculpate the accused. Where exculpatory
19 evidence is classified, the accused shall be provided with
20 an adequate substitute in accordance with the procedures
21 under subsection (b).

22 “(2) In this subsection, the term ‘evidence known to
23 trial counsel’, in the case of exculpatory evidence, means
24 exculpatory evidence that the prosecution would be re-

1 quired to disclose in a trial by courts-martial under chap-
 2 ter 47 of this title.

3 **“§ 949k. Defense of lack of mental responsibility**

4 “(a) AFFIRMATIVE DEFENSE.—It is an affirmative
 5 defense in a trial by military commission under this chap-
 6 ter that, at the time of the commission of the acts consti-
 7 tuting the offense, the accused, as a result of a severe
 8 mental disease or defect, was unable to appreciate the na-
 9 ture and quality or the wrongfulness of the acts. Mental
 10 disease or defect does not otherwise constitute a defense.

11 “(b) BURDEN OF PROOF.—The accused in a military
 12 commission under this chapter has the burden of proving
 13 the defense of lack of mental responsibility by clear and
 14 convincing evidence.

15 “(c) FINDINGS FOLLOWING ASSERTION OF DE-
 16 FENSE.—Whenever lack of mental responsibility of the ac-
 17 cused with respect to an offense is properly at issue in
 18 a military commission under this chapter, the military
 19 judge shall instruct the members as to the defense of lack
 20 of mental responsibility under this section and shall
 21 charge the members to find the accused—

22 “(1) guilty;

23 “(2) not guilty; or

24 “(3) subject to subsection (d), not guilty by rea-
 25 son of lack of mental responsibility.

1 “(d) MAJORITY VOTE REQUIRED FOR FINDING.—
 2 The accused shall be found not guilty by reason of lack
 3 of mental responsibility under subsection (c)(3) only if a
 4 majority of the members present at the time the vote is
 5 taken determines that the defense of lack of mental re-
 6 sponsibility has been established.

7 **“§ 949l. Voting and rulings**

8 “(a) VOTE BY SECRET WRITTEN BALLOT.—Voting
 9 by members of a military commission under this chapter
 10 on the findings and on the sentence shall be by secret writ-
 11 ten ballot.

12 “(b) RULINGS.—(1) The military judge in a military
 13 commission under this chapter shall rule upon all ques-
 14 tions of law, including the admissibility of evidence and
 15 all interlocutory questions arising during the proceedings.

16 “(2) Any ruling made by the military judge upon a
 17 question of law or an interlocutory question (other than
 18 the factual issue of mental responsibility of the accused)
 19 is conclusive and constitutes the ruling of the military
 20 commission. However, a military judge may change his
 21 ruling at any time during the trial.

22 “(c) INSTRUCTIONS PRIOR TO VOTE.—Before a vote
 23 is taken of the findings of a military commission under
 24 this chapter, the military judge shall, in the presence of

1 the accused and counsel, instruct the members as to the
 2 elements of the offense and charge the members—

3 “(1) that the accused must be presumed to be
 4 innocent until his guilt is established by legal and
 5 competent evidence beyond a reasonable doubt;

6 “(2) that in the case being considered, if there
 7 is a reasonable doubt as to the guilt of the accused,
 8 the doubt must be resolved in favor of the accused
 9 and he must be acquitted;

10 “(3) that, if there is reasonable doubt as to the
 11 degree of guilt, the finding must be in a lower de-
 12 gree as to which there is no reasonable doubt; and

13 “(4) that the burden of proof to establish the
 14 guilt of the accused beyond a reasonable doubt is
 15 upon the United States.

16 **“§ 949m. Number of votes required**

17 “(a) CONVICTION.—No person may be convicted by
 18 a military commission under this chapter of any offense,
 19 except as provided in section 949i(b) of this title or by
 20 concurrence of two-thirds of the members present at the
 21 time the vote is taken.

22 “(b) SENTENCES.—(1) Except as provided in para-
 23 graphs (2) and (3), sentences shall be determined by a
 24 military commission by the concurrence of two-thirds of
 25 the members present at the time the vote is taken.

1 “(2) No person may be sentenced to death by a mili-
2 tary commission, except insofar as—

3 “(A) the penalty of death has been expressly
4 authorized under this chapter, chapter 47 of this
5 title, or the law of war for an offense of which the
6 accused has been found guilty;

7 “(B) trial counsel expressly sought the penalty
8 of death by filing an appropriate notice in advance
9 of trial;

10 “(C) the accused was convicted of the offense
11 by the concurrence of all the members present at the
12 time the vote is taken; and

13 “(D) all members present at the time the vote
14 was taken concurred in the sentence of death.

15 “(3) No person may be sentenced to life imprison-
16 ment, or to confinement for more than 10 years, by a mili-
17 tary commission under this chapter except by the concur-
18 rence of three-fourths of the members present at the time
19 the vote is taken.

20 “(c) NUMBER OF MEMBERS REQUIRED FOR PEN-
21 ALTY OF DEATH.—(1) Except as provided in paragraph
22 (2), in a case in which the penalty of death is sought, the
23 number of members of the military commission under this
24 chapter shall be not less than 12 members.

1 “(2) In any case described in paragraph (1) in which
 2 12 members are not reasonably available for a military
 3 commission because of physical conditions or military ex-
 4 igencies, the convening authority shall specify a lesser
 5 number of members for the military commission (but not
 6 fewer than 5 members), and the military commission may
 7 be assembled, and the trial held, with not less than the
 8 number of members so specified. In any such case, the
 9 convening authority shall make a detailed written state-
 10 ment, to be appended to the record, stating why a greater
 11 number of members were not reasonably available.

12 **“§ 949n. Military commission to announce action**

13 “A military commission under this chapter shall an-
 14 nounce its findings and sentence to the parties as soon
 15 as determined.

16 **“§ 949o. Record of trial**

17 “(a) RECORD; AUTHENTICATION.—Each military
 18 commission under this chapter shall keep a separate, ver-
 19 batim, record of the proceedings in each case brought be-
 20 fore it, and the record shall be authenticated by the signa-
 21 ture of the military judge. If the record cannot be authen-
 22 ticated by the military judge by reason of his death, dis-
 23 ability, or absence, it shall be authenticated by the signa-
 24 ture of the trial counsel or by a member if the trial counsel
 25 is unable to authenticate it by reason of his death, dis-

1 ability, or absence. Where appropriate, and as provided
 2 in regulations prescribed by the Secretary of Defense, the
 3 record of a military commission under this chapter may
 4 contain a classified annex.

5 “(b) COMPLETE RECORD REQUIRED.—A complete
 6 record of the proceedings and testimony shall be prepared
 7 in every military commission under this chapter.

8 “(c) PROVISION OF COPY TO ACCUSED.—A copy of
 9 the record of the proceedings of the military commission
 10 under this chapter shall be given the accused as soon as
 11 it is authenticated. If the record contains classified infor-
 12 mation, or a classified annex, the accused shall receive a
 13 redacted version of the record consistent with the require-
 14 ments of section 949d(e) of this title. Defense counsel
 15 shall have access to the unredacted record, as provided
 16 in regulations prescribed by the Secretary of Defense.

17 “SUBCHAPTER V—SENTENCES

“Sec.

“949s. Cruel or unusual punishments prohibited.

“949t. Maximum limits.

“949u. Execution of confinement.

18 “§ 949s. Cruel or unusual punishments prohibited

19 “Punishment by flogging, or by branding, marking,
 20 or tattooing on the body, or any other cruel or unusual
 21 punishment, may not be adjudged by a military commis-
 22 sion under this chapter or inflicted under this chapter
 23 upon any person subject to this chapter. The use of irons,

1 single or double, except for the purpose of safe custody,
 2 is prohibited under this chapter.

3 **“§ 949t. Maximum limits**

4 “The punishment which a military commission under
 5 this chapter may direct for an offense may not exceed such
 6 limits as the President or Secretary of Defense may pre-
 7 scribe for that offense.

8 **“§ 949u. Execution of confinement**

9 “(a) IN GENERAL.—Under such regulations as the
 10 Secretary of Defense may prescribe, a sentence of confine-
 11 ment adjudged by a military commission under this chap-
 12 ter may be carried into execution by confinement—

13 “(1) in any place of confinement under the con-
 14 trol of any of the armed forces; or

15 “(2) in any penal or correctional institution
 16 under the control of the United States or its allies,
 17 or which the United States may be allowed to use.

18 “(b) TREATMENT DURING CONFINEMENT BY OTHER
 19 THAN THE ARMED FORCES.—Persons confined under
 20 subsection (a)(2) in a penal or correctional institution not
 21 under the control of an armed force are subject to the
 22 same discipline and treatment as persons confined or com-
 23 mitted by the courts of the United States or of the State,
 24 District of Columbia, or place in which the institution is
 25 situated.

1 “SUBCHAPTER VI—POST-TRIAL PROCEDURE
2 AND REVIEW OF MILITARY COMMISSIONS

“Sec.

“950a. Error of law; lesser included offense.

“950b. Review by the convening authority.

“950c. Waiver or withdrawal of appeal.

“950d. Appeal by the United States.

“950e. Rehearings.

“950f. Review by Court of Military Commission Review.

“950g. Review by the United States Court of Appeals for the District of Columbia Circuit and the Supreme Court.

“950h. Appellate counsel

“950i. Execution of sentence; suspension of sentence.

“950j. Finality of proceedings, findings, and sentences.

3 **“§ 950a. Error of law; lesser included offense**

4 “(a) ERROR OF LAW.—A finding or sentence of a
5 military commission under this chapter may not be held
6 incorrect on the ground of an error of law unless the error
7 materially prejudices the substantial rights of the accused.

8 “(b) LESSER INCLUDED OFFENSE.—Any reviewing
9 authority with the power to approve or affirm a finding
10 of guilty by a military commission under this chapter may
11 approve or affirm, instead, so much of the finding as in-
12 cludes a lesser included offense.

13 **“§ 950b. Review by the convening authority**

14 “(a) NOTICE TO CONVENING AUTHORITY OF FIND-
15 INGS AND SENTENCE.—The findings and sentence of a
16 military commission under this chapter shall be reported
17 in writing promptly to the convening authority after the
18 announcement of the sentence.

1 “(b) SUBMITTAL OF MATTERS BY ACCUSED TO CON-
2 VENING AUTHORITY.—(1) The accused may submit to the
3 convening authority matters for consideration by the con-
4 vening authority with respect to the findings and the sen-
5 tence of the military commission under this chapter.

6 “(2)(A) Except as provided in subparagraph (B), a
7 submittal under paragraph (1) shall be made in writing
8 within 20 days after accused has been give an authenti-
9 cated record of trial under section 949o(c) of this title.

10 “(B) If the accused shows that additional time is re-
11 quired for the accused to make a submittal under para-
12 graph (1), the convening authority may, for good cause,
13 extend the applicable period under subparagraph (A) for
14 not more than an additional 20 days.

15 “(3) The accused may waive his right to make a sub-
16 mittal to the convening authority under paragraph (1).
17 Such a waiver shall be made in writing, and may not be
18 revoked. For the purposes of subsection (c)(2), the time
19 within which the accused may make a submittal under this
20 subsection shall be deemed to have expired upon the sub-
21 mittal of a waiver under this paragraph to the convening
22 authority.

23 “(c) ACTION BY CONVENING AUTHORITY.—(1) The
24 authority under this subsection to modify the findings and
25 sentence of a military commission under this chapter is

1 a matter of the sole discretion and prerogative of the con-
2 vening authority.

3 “(2) The convening authority is not required to take
4 action on the findings of a military commission under this
5 chapter. If the convening authority takes action on the
6 findings, the convening authority may, in his sole discre-
7 tion, only—

8 “(A) dismiss any charge or specification by set-
9 ting aside a finding of guilty thereto; or

10 “(B) change a finding of guilty to a charge to
11 a finding of guilty to an offense that is a lesser in-
12 cluded offense of the offense stated in the charge.

13 “(3)(A) The convening authority shall take action on
14 the sentence of a military commission under this chapter.

15 “(B) Subject to regulations prescribed by the Sec-
16 retary of Defense, action under this paragraph may be
17 taken only after consideration of any matters submitted
18 by the accused under subsection (b) or after the time for
19 submitting such matters expires, whichever is earlier.

20 “(C) In taking action under this paragraph, the con-
21 vening authority may, in his sole discretion, approve, dis-
22 approve, commute, or suspend the sentence in whole or
23 in part. The convening authority may not increase a sen-
24 tence beyond that which is found by the military commis-
25 sion.

1 “(4) The convening authority shall serve on the ac-
2 cused or on defense counsel notice of any action taken by
3 the convening authority under this subsection.

4 “(d) ORDER OF REVISION OR REHEARING.—(1) Sub-
5 ject to paragraphs (2) and (3), the convening authority
6 of a military commission under this chapter may, in his
7 sole discretion, order a proceeding in revision or a rehear-
8 ing.

9 “(2)(A) Except as provided in subparagraph (B), a
10 proceeding in revision may be ordered by the convening
11 authority if—

12 “(i) there is an apparent error or omission in
13 the record; or

14 “(ii) the record shows improper or inconsistent
15 action by the military commission with respect to
16 the findings or sentence that can be rectified without
17 material prejudice to the substantial rights of the
18 accused.

19 “(B) In no case may a proceeding in revision—

20 “(i) reconsider a finding of not guilty of a spec-
21 ification or a ruling which amounts to a finding of
22 not guilty;

23 “(ii) reconsider a finding of not guilty of any
24 charge, unless there has been a finding of guilty

1 under a specification laid under that charge, which
2 sufficiently alleges a violation; or

3 “(iii) increase the severity of the sentence un-
4 less the sentence prescribed for the offense is man-
5 datory.

6 “(3) A rehearing may be ordered by the convening
7 authority if the convening authority disapproves the find-
8 ings and sentence and states the reasons for disapproval
9 of the findings. If the convening authority disapproves the
10 finding and sentence and does not order a rehearing, the
11 convening authority shall dismiss the charges. A rehearing
12 as to the findings may not be ordered by the convening
13 authority when there is a lack of sufficient evidence in the
14 record to support the findings. A rehearing as to the sen-
15 tence may be ordered by the convening authority if the
16 convening authority disapproves the sentence.

17 **“§ 950c. Waiver or withdrawal of appeal**

18 “(a) WAIVER OF RIGHT OF REVIEW.—(1) An ac-
19 cused may file with the convening authority a statement
20 expressly waiving the right of the accused to appellate re-
21 view by the Court of Military Commission Review under
22 section 950f of this title of the final decision of the mili-
23 tary commission under this chapter.

24 “(2) A waiver under paragraph (1) shall be signed
25 by both the accused and a defense counsel.

1 “(3) A waiver under paragraph (1) must be filed, if
 2 at all, within 10 days after notice of the action is served
 3 on the accused or on defense counsel under section
 4 950b(c)(4) of this title. The convening authority, for good
 5 cause, may extend the period for such filing by not more
 6 than 30 days.

7 “(b) WITHDRAWAL OF APPEAL.—Except in a case in
 8 which the sentence as approved under section 950b of this
 9 title extends to death, the accused may withdraw an ap-
 10 peal at any time.

11 “(c) EFFECT OF WAIVER OR WITHDRAWAL.—A
 12 waiver of the right to appellate review or the withdrawal
 13 of an appeal under this section bars review under section
 14 950f of this title.

15 **“§ 950d. Appeal by the United States**

16 “(a) INTERLOCUTORY APPEAL.—(1) Except as pro-
 17 vided in paragraph (2), in a trial by military commission
 18 under this chapter, the United States may take an inter-
 19 locutory appeal to the Court of Military Commission Re-
 20 view under section 950f of this title of any order or ruling
 21 of the military judge that—

22 “(A) terminates proceedings of the military
 23 commission with respect to a charge or specification;

24 “(B) excludes evidence that is substantial proof
 25 of a fact material in the proceeding; or

1 “(C) relates to a matter under subsection (c),
2 (d), or (e) of section 949d of this title.

3 “(2) The United States may not appeal under para-
4 graph (1) an order or ruling that is, or amounts to, a find-
5 ing of not guilty by the military commission with respect
6 to a charge or specification.

7 “(b) NOTICE OF APPEAL.—The United States shall
8 take an appeal of an order or ruling under subsection (a)
9 by filing a notice of appeal with the military judge within
10 five days after the date of the order or ruling.

11 “(c) APPEAL.—An appeal under this section shall be
12 forwarded, by means specified in regulations prescribed
13 the Secretary of Defense, directly to the Court of Military
14 Commission Review. In ruling on an appeal under this sec-
15 tion, the Court may act only with respect to matters of
16 law.

17 **“§ 950e. Rehearings**

18 “(a) COMPOSITION OF MILITARY COMMISSION FOR
19 REHEARING.—Each rehearing under this chapter shall
20 take place before a military commission under this chapter
21 composed of members who were not members of the mili-
22 tary commission which first heard the case.

23 “(b) SCOPE OF REHEARING.—(1) Upon a rehear-
24 ing—

1 “(A) the accused may not be tried for any of-
2 fense of which he was found not guilty by the first
3 military commission; and

4 “(B) no sentence in excess of or more than the
5 original sentence may be imposed unless—

6 “(i) the sentence is based upon a finding
7 of guilty of an offense not considered upon the
8 merits in the original proceedings; or

9 “(ii) the sentence prescribed for the of-
10 fense is mandatory.

11 “(2) Upon a rehearing, if the sentence approved after
12 the first military commission was in accordance with a
13 pretrial agreement and the accused at the rehearing
14 changes his plea with respect to the charges or specifica-
15 tions upon which the pretrial agreement was based, or oth-
16 erwise does not comply with pretrial agreement, the sen-
17 tence as to those charges or specifications may include any
18 punishment not in excess of that lawfully adjudged at the
19 first military commission.

20 **“§ 950f. Review by Court of Military Commission Re-**
21 **view**

22 “(a) ESTABLISHMENT.—The Secretary of Defense
23 shall establish a Court of Military Commission Review
24 which shall be composed of one or more panels, and each
25 such panel shall be composed of not less than three appel-

1 late military judges. For the purpose of reviewing military
2 commission decisions under this chapter, the Court may
3 sit in panels or as a whole in accordance with rules pre-
4 scribed by the Secretary.

5 “(b) APPELLATE MILITARY JUDGES.—The Secretary
6 shall assign appellate military judges to a Court of Mili-
7 tary Commission Review. Each appellate military judge
8 shall meet the qualifications for military judges prescribed
9 by section 948j(b) of this title or shall be a civilian with
10 comparable qualifications. No person may serve as an ap-
11 pellate military judge in any case in which that person
12 acted as a military judge, counsel, or reviewing official.

13 “(c) RIGHT OF APPEAL.—The accused may appeal
14 from a final decision of a military commission, and the
15 United States may appeal as provided in section 950d of
16 this title, to the Court of Military Commission Review in
17 accordance with procedures prescribed under regulations
18 of the Secretary.

19 “(d) SCOPE OF REVIEW.—In a case reviewed by the
20 Court of Military Commission Review under this section,
21 the Court may act only with respect to matters of law.

1 **“§ 950g. Review by the United States Court of Ap-**
 2 **peals for the District of Columbia Circuit**
 3 **and the Supreme Court**

4 “(a) REVIEW BY UNITED STATES COURT OF AP-
 5 PEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.—(1)
 6 Subject to the provisions of this subsection, the United
 7 States Court of Appeals for the District of Columbia Cir-
 8 cuit shall have exclusive jurisdiction to determine the final
 9 validity of any judgment rendered by a military commis-
 10 sion under this chapter.

11 “(2) The United States Court of Appeals for the Dis-
 12 trict of Columbia Circuit may not determine the final va-
 13 lidity of a judgment of a military commission under this
 14 subsection until all other appeals from the judgment under
 15 this chapter have been waived or exhausted.

16 “(3)(A) An accused may seek a determination by the
 17 United States Court of Appeals for the District of Colum-
 18 bia Circuit of the final validity of the judgment of the mili-
 19 tary commission under this subsection only upon petition
 20 to the Court for such determination.

21 “(B) A petition on a judgment under subparagraph
 22 (A) shall be filed by the accused in the Court not later
 23 than 20 days after the date on which—

24 “(i) written notice of the final decision of the
 25 military commission is served on the accused or de-
 26 fense counsel; or

1 “(ii) the accused submits, in the form pre-
 2 scribed by section 950c of this title, a written notice
 3 waiving the right of the accused to review by the
 4 Court of Military Commission Review under section
 5 950f of this title.

6 “(C) The accused may not file a petition under sub-
 7 paragraph (A) if the accused has waived the right to ap-
 8 pellate review under section 950c(a) of this title.

9 “(4) The determination by the United States Court
 10 of Appeals for the District of Columbia Circuit of the final
 11 validity of a judgment of a military commission under this
 12 subsection shall be governed by the provisions of section
 13 1005(e)(3) of the Detainee Treatment Act of 2005 (42
 14 U.S.C. 801 note).

15 “(b) REVIEW BY SUPREME COURT.—The Supreme
 16 Court of the United States may review by writ of certiorari
 17 pursuant to section 1257 of title 28 the final judgment
 18 of the United States Court of Appeals for the District of
 19 Columbia Circuit in a determination under subsection (a).

20 **“§ 950h. Appellate counsel**

21 “(a) APPOINTMENT.—The Secretary of Defense
 22 shall, by regulation, establish procedures for the appoint-
 23 ment of appellate counsel for the United States and for
 24 the accused in military commissions under this chapter.
 25 Appellate counsel shall meet the qualifications of counsel

1 for appearing before military commissions under this
2 chapter.

3 “(b) REPRESENTATION OF UNITED STATES.—Appel-
4 late counsel may represent the United States in any ap-
5 peal or review proceeding under this chapter. Appellate
6 Government counsel may represent the United States be-
7 fore the United States Court of Appeals for the District
8 of Columbia Circuit and the Supreme Court in cases aris-
9 ing under this chapter when requested to do so by the
10 Attorney General.

11 “(c) REPRESENTATION OF ACCUSED.—The accused
12 shall be represented before the United States Court of Ap-
13 peals for the District of Columbia Circuit or the Supreme
14 Court by military appellate counsel, or by civilian counsel
15 if retained by him.

16 **“§ 950i. Execution of sentence; suspension of sentence**

17 “(a) EXECUTION OF SENTENCE OF DEATH ONLY
18 UPON APPROVAL BY THE PRESIDENT.—If the sentence
19 of a military commission under this chapter extends to
20 death, that part of the sentence providing for death may
21 not be executed until approved by the President. In such
22 a case, the President may commute, remit, or suspend the
23 sentence, or any part thereof, as he sees fit.

24 “(b) EXECUTION OF SENTENCE OF DEATH ONLY
25 UPON FINAL JUDGMENT OF LEGALITY OF PRO-

1 PROCEEDINGS.—(1) If the sentence of a military commission
 2 under this chapter extends to death, the sentence may not
 3 be executed until there is a final judgement as to the legal-
 4 ity of the proceedings (and with respect to death, approval
 5 under subsection (a)).

6 “(2) A judgement as to legality of proceedings is final
 7 for purposes of paragraph (1) when—

8 “(A) the time for the accused to file a petition
 9 for review by the United States Court of Appeals for
 10 the District of Columbia Circuit has expired and the
 11 accused has not filed a timely petition for such re-
 12 view and the case is not otherwise under review by
 13 the Court; or

14 “(B) review is completed in accordance with the
 15 judgment of the United States Court of Appeals for
 16 the District of Columbia Circuit and (A) a petition
 17 for a writ of certiorari is not timely filed, (B) such
 18 a petition is denied by the Supreme Court, or (C)
 19 review is otherwise completed in accordance with the
 20 judgment of the Supreme Court.

21 “(c) SUSPENSION OF SENTENCE.—The Secretary of
 22 the Defense, or the convening authority acting on the case
 23 (if other than the Secretary), may suspend the execution
 24 of any sentence or part thereof in the case, except a sen-
 25 tence of death.

1 **“§ 950j. Finality of proceedings, findings, and sen-**
 2 **tences**

3 “(a) FINALITY.—The appellate review of records of
 4 trial provided by this chapter, and the proceedings, find-
 5 ings, and sentences of military commissions as approved,
 6 reviewed, or affirmed as required by this chapter, are final
 7 and conclusive. Orders publishing the proceedings of mili-
 8 tary commissions under this chapter are binding upon all
 9 departments, courts, agencies, and officers of the United
 10 States, except as otherwise provided by the President.

11 “(b) PROVISIONS OF CHAPTER SOLE BASIS FOR RE-
 12 VIEW OF MILITARY COMMISSION PROCEDURES AND AC-
 13 TIONS.—Except as otherwise provided in this chapter and
 14 notwithstanding any other provision of law (including sec-
 15 tion 2241 of title 28 or any other habeas corpus provi-
 16 sion), no court, justice, or judge shall have jurisdiction to
 17 hear or consider any claim or cause of action whatsoever,
 18 including any action pending on or filed after the date of
 19 enactment of this chapter, relating to the prosecution,
 20 trial, or judgment of a military commission under this
 21 chapter, including challenges to the lawfulness of proce-
 22 dures of military commissions under this chapter.

23 **“SUBCHAPTER VII—PUNITIVE MATTERS**

“Sec.

“950aa. Definitions; construction of certain offenses; common circumstances.

“950bb. Statement of substantive offenses.

“950cc. Principals.

“950dd. Accessory after the fact.

“950ee. Conviction of lesser offenses.
 “950ff. Attempts.
 “950gg. Solicitation.
 “950hh. Murder of protected persons.
 “950ii. Attacking civilians.
 “950jj. Attacking civilian objects.
 “950kk. Attacking protected property.
 “950ll. Pillaging.
 “950mm. Denying quarter.
 “950nn. Taking hostages.
 “950oo. Employing poison or similar weapons.
 “950pp. Using protected persons as a shield.
 “950qq. Using protected property as a shield.
 “950rr. Torture.
 “950ss. Cruel or inhuman treatment.
 “950tt. Intentionally causing serious bodily injury.
 “950uu. Mutilating or maiming.
 “950vv. Murder in violation of the law of war.
 “950ww. Destruction of property in violation of the law of war.
 “950xx. Using treachery or perfidy.
 “950yy. Improperly using a flag of truce.
 “950zz. Improperly using a distinctive emblem.
 “950aaa. Intentionally mistreating a dead body.
 “950bbb. Rape.
 “950ccc. Hijacking or hazarding a vessel or aircraft.
 “950ddd. Terrorism.
 “950eee. Providing material support for terrorism.
 “950fff. Wrongfully aiding the enemy.
 “950ggg. Spying.
 “950hhh. Conspiracy.
 “950iii. Contempt.
 “950jjj. Perjury and obstruction of justice.

1 **“§ 950aa. Definitions; construction of certain offenses;**

2 **common circumstances**

3 “(a) DEFINITIONS.—In this subchapter:

4 “(1) The term ‘military objective’ means com-
 5 batants and those objects during an armed conflict
 6 which, by their nature, location, purpose, or use, ef-
 7 fectively contribute to the war-fighting or war-sus-
 8 taining capability of an opposing force and whose
 9 total or partial destruction, capture, or neutraliza-
 10 tion would constitute a definite military advantage

1 to the attacker under the circumstances at the time
2 of an attack.

3 “(2) The term ‘protected person’ means any
4 person entitled to protection under one or more of
5 the Geneva Conventions, including civilians not tak-
6 ing an active part in hostilities, military personnel
7 placed out of combat by sickness, wounds, or deten-
8 tion, and military medical or religious personnel.

9 “(3) The term ‘protected property’ means any
10 property specifically protected by the law of war, in-
11 cluding buildings dedicated to religion, education,
12 art, science, or charitable purposes, historic monu-
13 ments, hospitals, and places where the sick and
14 wounded are collected, but only if and to the extent
15 such property is not being used for military purposes
16 or is not otherwise a military objective. The term in-
17 cludes objects properly identified by one of the dis-
18 tinctive emblems of the Geneva Conventions, but
19 does not include civilian property that is a military
20 objective.

21 “(b) CONSTRUCTION OF CERTAIN OFFENSES.—The
22 intent required for offenses under sections 950hh, 950ii,
23 950jj, 950kk, and 950ss of this title precludes their appli-
24 cability with regard to collateral damage or to death, dam-
25 age, or injury incident to a lawful attack.

1 “(c) COMMON CIRCUMSTANCES.—An offense speci-
 2 fied in this subchapter is triable by military commission
 3 under this chapter only if the offense is committed in the
 4 context of and associated with armed conflict.

5 **“§ 950bb. Statement of substantive offenses**

6 “(a) PURPOSE.—The provisions of this subchapter
 7 codify offenses that have traditionally been triable by mili-
 8 tary commissions. This chapter does not establish new
 9 crimes that did not exist before its enactment, but rather
 10 codifies those crimes for trial by military commission.

11 “(b) EFFECT.—Because the provisions of this sub-
 12 chapter (including provisions that incorporate definitions
 13 in other provisions of law) are declarative of existing law,
 14 they do not preclude trial for crimes that occurred before
 15 the date of the enactment of this chapter.

16 **“§ 950cc. Principals**

17 “Any person is punishable as a principle under this
 18 chapter who—

19 “(1) commits an offense punishable by this
 20 chapter, or aids, abets, counsels, commands, or pro-
 21 cures its commission;

22 “(2) causes an act to be done which if directly
 23 performed by him would be punishable by this chap-
 24 ter; or

1 “(3) is a superior commander who, with regard
 2 to acts punishable under this chapter, knew, had
 3 reason to know, or should have known, that a subor-
 4 dinate was about to commit such acts or had done
 5 so and the superior failed to take the necessary and
 6 reasonable measures to prevent such acts or to pun-
 7 ish the perpetrators thereof.

8 **“§ 950dd. Accessory after the fact**

9 “Any person subject to this chapter who, knowing
 10 that an offense punishable by this chapter has been com-
 11 mitted, receives, comforts, or assists the offender in order
 12 to hinder or prevent his apprehension, trial, or punishment
 13 shall be punished as a military commission under this
 14 chapter may direct.

15 **“§ 950ee. Conviction of lesser offenses**

16 “An accused may be found guilty of an offense nec-
 17 essarily included in the offense charged or of an attempt
 18 to commit either the offense charged or an attempt to
 19 commit either the offense charged or an offense nec-
 20 essarily included therein.

21 **“§ 950ff. Attempts**

22 “(a) IN GENERAL.—Any person subject to this chap-
 23 ter who attempts to commit any offense punishable by this
 24 chapter shall be punished as a military commission under
 25 this chapter may direct.

1 “(b) SCOPE OF OFFENSE.—An act, done with spe-
 2 cific intent to commit an offense under this chapter,
 3 amounting to more than mere preparation and tending,
 4 even though failing, to effect its commission, is an attempt
 5 to commit that offense.

6 “(c) EFFECT OF CONSUMMATION.—Any person sub-
 7 ject to this chapter may be convicted of an attempt to com-
 8 mit an offense although it appears on the trial that the
 9 offense was consummated.

10 **“§ 950gg. Solicitation**

11 “Any person subject to this chapter who solicits or
 12 advises another or others to commit one or more sub-
 13 stantive offenses triable by military commission under this
 14 chapter shall, if the offense solicited or advised is at-
 15 tempted or committed, be punished with the punishment
 16 provided for the commission of the offense, but, if the of-
 17 fense solicited or advised is not committed or attempted,
 18 he shall be punished as a military commission under this
 19 chapter may direct.

20 **“§ 950hh. Murder of protected persons**

21 “Any person subject to this chapter who intentionally
 22 kills one or more protected persons shall be punished by
 23 death or such other punishment as a military commission
 24 under this chapter may direct.

1 **“§ 950ii. Attacking civilians**

2 “Any person subject to this chapter who intentionally
 3 engages in an attack upon a civilian population as such,
 4 or individual civilians not taking active part in hostilities,
 5 shall be punished, if death results to one or more of the
 6 victims, by death or such other punishment as a military
 7 commission under this chapter may direct, and, if death
 8 does not result to any of the victims, by such punishment,
 9 other than death, as a military commission under this
 10 chapter may direct.

11 **“§ 950jj. Attacking civilian objects**

12 “Any person subject to this chapter who intentionally
 13 engages in an attack upon a civilian object that is not a
 14 military objective shall be punished as a military commis-
 15 sion under this chapter may direct.

16 **“§ 950kk. Attacking protected property**

17 “Any person subject to this chapter who intentionally
 18 engages in an attack upon protected property shall be pun-
 19 ished as a military commission under this chapter may
 20 direct.

21 **“§ 950ll. Pillaging**

22 “Any person subject to this chapter who intentionally
 23 and in the absence of military necessity appropriates or
 24 seizes property for private or personal use, without the
 25 consent of a person with authority to permit such appro-

1 priation or seizure, shall be punished as a military com-
 2 mission under this chapter may direct.

3 **“§ 950mm. Denying quarter**

4 “Any person subject to this chapter who, with effec-
 5 tive command or control over subordinate groups, de-
 6 clares, orders, or otherwise indicates to those groups that
 7 there shall be no survivors or surrender accepted, with the
 8 intent to threaten an adversary or to conduct hostilities
 9 such that there would be no survivors or surrender accept-
 10 ed, shall be punished as a military commission under this
 11 chapter may direct.

12 **“§ 950nn. Taking hostages**

13 “Any person subject to this chapter who, having
 14 knowingly seized or detained one or more persons, threat-
 15 ens to kill, injure, or continue to detain such person or
 16 persons with the intent of compelling any nation, person
 17 other than the hostage, or group of persons to act or re-
 18 frain from acting as an explicit or implicit condition for
 19 the safety or release of such person or persons, shall be
 20 punished, if death results to one or more of the victims,
 21 by death or such other punishment as a military commis-
 22 sion under this chapter may direct, and, if death does not
 23 result to any of the victims, by such punishment, other
 24 than death, as a military commission under this chapter
 25 may direct.

1 **“§ 950oo. Employing poison or similar weapons**

2 “Any person subject to this chapter who inten-
3 tionally, as a method of warfare, employs a substance or
4 weapon that releases a substance that causes death or se-
5 rious and lasting damage to health in the ordinary course
6 of events, through its asphyxiating, bacteriological, or
7 toxic properties, shall be punished, if death results to one
8 or more of the victims, by death or such other punishment
9 as a military commission under this chapter may direct,
10 and, if death does not result to any of the victims, by such
11 punishment, other than death, as a military commission
12 under this chapter may direct.

13 **“§ 950pp. Using protected persons as a shield**

14 “Any person subject to this chapter who positions,
15 or otherwise takes advantage of, a protected person with
16 the intent to shield a military objective from attack. or
17 to shield, favor, or impede military operations, shall be
18 punished, if death results to one or more of the victims,
19 by death or such other punishment as a military commis-
20 sion under this chapter may direct, and, if death does not
21 result to any of the victims, by such punishment, other
22 than death, as a military commission under this chapter
23 may direct.

24 **“§ 950qq. Using protected property as a shield**

25 “Any person subject to this chapter who positions,
26 or otherwise takes advantage of the location of, protected

1 property with the intent to shield a military objective from
 2 attack, or to shield, favor, or impede military operations,
 3 shall be punished as a military commission under this
 4 chapter may direct.

5 **“§ 950rr. Torture**

6 “(a) OFFENSE.—Any person subject to this chapter
 7 who commits an act specifically intended to inflict severe
 8 physical or mental pain or suffering (other than pain or
 9 suffering incidental to lawful sanctions) upon another per-
 10 son within his custody or physical control for the purpose
 11 of obtaining information or a confession, punishment, in-
 12 timidation, coercion, or any reason based on discrimina-
 13 tion of any kind, shall be punished, if death results to one
 14 or more of the victims, by death or such other punishment
 15 as a military commission under this chapter may direct,
 16 and, if death does not result to any of the victims, by such
 17 punishment, other than death, as a military commission
 18 under this chapter may direct.

19 “(b) SEVERE MENTAL PAIN OR SUFFERING DE-
 20 FINED.—In this section, the term ‘severe mental pain or
 21 suffering’ has the meaning given that term in section
 22 2340(2) of title 18.

23 **“§ 950ss. Cruel or inhuman treatment**

24 “(a) OFFENSE.—Any person subject to this chapter
 25 who commits, or conspires or attempts to commit, an act

1 intended to inflict severe or serious physical or mental
 2 pain or suffering (other than pain or suffering incidental
 3 to lawful sanctions), including serious physical abuse,
 4 upon another within his custody or control shall be pun-
 5 ished, if death results to the victim, by death or such other
 6 punishment as a military commission under this chapter
 7 may direct, and, if death does not result to the victim,
 8 by such punishment, other than death, as a military com-
 9 mission under this chapter may direct.

10 “(b) DEFINITIONS.—In this section:

11 “(1) The term ‘severe mental pain or suffering’
 12 has the meaning given that term in section 2340(2)
 13 of title 18.

14 “(2) The term ‘serious physical pain or suf-
 15 fering’ means bodily injury that involves—

16 “(A) a substantial risk of death;

17 “(B) extreme physical pain;

18 “(C) a burn or physical disfigurement of a
 19 serious nature (other than cuts, abrasions, or
 20 bruises); or

21 “(D) significant loss or impairment of the
 22 function of a bodily member, organ, or mental
 23 faculty.

24 “(3) The term ‘serious mental pain or suf-
 25 fering’ has the meaning given the term ‘severe men-

1 tal pain or suffering’ in section 2340(2) of title 18,
2 except that—

3 “(A) the term ‘serious’ shall replace the
4 term ‘severe’ where it appears; and

5 “(B) as to conduct occurring after the date
6 of the enactment of the Military Commission
7 Act of 2006, the term ‘serious and non-transi-
8 tory mental harm (which need not be pro-
9 longed)’ shall replace the term ‘prolonged men-
10 tal harm’ where it appears.

11 **“§ 950tt. Intentionally causing serious bodily injury**

12 “(a) OFFENSE.—Any person subject to this chapter
13 who intentionally causes serious bodily injury to one or
14 more persons, including lawful combatants, in violation of
15 the law of war shall be punished, if death results to one
16 or more of the victims, by death or such other punishment
17 as a military commission under this chapter may direct,
18 and, if death does not result to any of the victims, by such
19 punishment, other than death, as a military commission
20 under this chapter may direct.

21 “(b) SERIOUS BODILY INJURY DEFINED.—In this
22 section, the term ‘serious bodily injury’ means bodily in-
23 jury which involves—

24 “(1) a substantial risk of death;

25 “(2) extreme physical pain;

1 “(3) protracted and obvious disfigurement; or

2 “(4) protracted loss or impairment of the func-
3 tion of a bodily member, organ, or mental faculty.

4 **“§ 950uu. Mutilating or maiming**

5 “Any person subject to this chapter who intentionally
6 injures one or more protected persons by disfiguring the
7 person or persons by any mutilation of the person or per-
8 sons, or by permanently disabling any member, limb, or
9 organ of the body of the person or persons, without any
10 legitimate medical or dental purpose, shall be punished,
11 if death results to one or more of the victims, by death
12 or such other punishment as a military commission under
13 this chapter may direct, and, if death does not result to
14 any of the victims, by such punishment, other than death,
15 as a military commission under this chapter may direct.

16 **“§ 950vv. Murder in violation of the law of war**

17 “Any person subject to this chapter who intentionally
18 kills one or more persons, including lawful combatants, in
19 violation of the law of war shall be punished by death or
20 such other punishment as a military commission under
21 this chapter may direct.

22 **“§ 950ww. Destruction of property in violation of the**
23 **law of war**

24 “Any person subject to this chapter who intentionally
25 destroys property belonging to another person in violation

1 of the law of war shall punished as a military commission
2 under this chapter may direct.

3 **“§ 950xx. Using treachery or perfidy**

4 “Any person subject to this chapter who, after invit-
5 ing the confidence or belief of one or more persons that
6 they were entitled to, or obliged to accord, protection
7 under the law of war, intentionally makes use of that con-
8 fidence or belief in killing, injuring, or capturing such per-
9 son or persons shall be punished, if death results to one
10 or more of the victims, by death or such other punishment
11 as a military commission under this chapter may direct,
12 and, if death does not result to any of the victims, by such
13 punishment, other than death, as a military commission
14 under this chapter may direct.

15 **“§ 950yy. Improperly using a flag of truce**

16 “Any person subject to this chapter who uses a flag
17 of truce to feign an intention to negotiate, surrender, or
18 otherwise suspend hostilities when there is no such inten-
19 tion shall be punished as a military commission under this
20 chapter may direct.

21 **“§ 950zz. Improperly using a distinctive emblem**

22 “Any person subject to this chapter who intentionally
23 uses a distinctive emblem recognized by the law of war
24 for combatant purposes in a manner prohibited by the law

1 of war shall be punished as a military commission under
2 this chapter may direct.

3 **“§ 950aaa. Intentionally mistreating a dead body**

4 “Any person subject to this chapter who intentionally
5 mistreats the body of a dead person, without justification
6 by legitimate military necessary, shall be punished as a
7 military commission under this chapter may direct.

8 **“§ 950bbb. Rape**

9 “Any person subject to this chapter who forcibly or
10 with coercion or threat of force wrongfully invades the
11 body of a person by penetrating, however slightly, the anal
12 or genital opening of the victim with any part of the body
13 of the accused, or with any foreign object, shall be pun-
14 ished as a military commission under this chapter may
15 direct.

16 **“§ 950ccc. Hijacking or hazarding a vessel or aircraft**

17 “Any person subject to this chapter who intentionally
18 seizes, exercises unauthorized control over, or endangers
19 the safe navigation of a vessel or aircraft that is not a
20 legitimate military objective shall be punished, if death re-
21 sults to one or more of the victims, by death or such other
22 punishment as a military commission under this chapter
23 may direct, and, if death does not result to any of the
24 victims, by such punishment, other than death, as a mili-
25 tary commission under this chapter may direct.

1 **“§ 950ddd. Terrorism**

2 “Any person subject to this chapter who intentionally
 3 kills or inflicts great bodily harm on one or more protected
 4 persons, or intentionally engages in an act that evinces
 5 a wanton disregard for human life, in a manner calculated
 6 to influence or affect the conduct of government or civilian
 7 population by intimidation or coercion, or to retaliate
 8 against government conduct, shall be punished, if death
 9 results to one or more of the victims, by death or such
 10 other punishment as a military commission under this
 11 chapter may direct, and, if death does not result to any
 12 of the victims, by such punishment, other than death, as
 13 a military commission under this chapter may direct.

14 **“§ 950eee. Providing material support for terrorism**

15 “(a) OFFENSE.—Any person subject to this chapter
 16 who provides material support or resources, knowing or
 17 intending that they are to be used in preparation for, or
 18 in carrying out, an act of terrorism (as set forth in section
 19 950ddd of this title), or who intentionally provides mate-
 20 rial support or resources to an international terrorist orga-
 21 nization engaged in hostilities against the United States,
 22 knowing that such organization has engaged or engages
 23 in terrorism (as so set forth), shall be punished as a mili-
 24 tary commission under this chapter may direct.

25 “(b) MATERIAL SUPPORT OR RESOURCES DE-
 26 FINED.—In this section, the term ‘material support or re-

1 sources' has the meaning given that term in section
2 2339A(b) of title 18.

3 **“§ 950fff. Wrongfully aiding the enemy**

4 “Any person subject to this chapter who, in breach
5 of an allegiance or duty to the United States, knowingly
6 and intentionally aids an enemy of the United States, or
7 one of the co-belligerents of the enemy, shall be punished
8 as a military commission under this chapter may direct.

9 **“§ 950ggg. Spying**

10 “Any person subject to this chapter who, in violation
11 of the law of war and with intent or reason to believe that
12 it is to be used to the injury of the United States or to
13 the advantage of a foreign power, collects or attempts to
14 collect information by clandestine means or while acting
15 under false pretenses, for the purpose of conveying such
16 information to an enemy of the United States, or one of
17 the co-belligerents of the enemy, shall be punished by
18 death or such other punishment as a military commission
19 under this chapter may direct.

20 **“§ 950hhh. Conspiracy**

21 “Any person subject to this chapter who conspires to
22 commit one or more substantive offenses triable by mili-
23 tary commission under this subchapter, and who know-
24 ingly does any overt act to effect the object of the con-
25 spiracy, shall be punished, if death results to one or more

1 of the victims, by death or such other punishment as a
 2 military commission under this chapter may direct, and,
 3 if death does not result to any of the victims, by such pun-
 4 ishment, other than death, as a military commission under
 5 this chapter may direct.

6 **“§ 950iii. Contempt**

7 “A military commission under this chapter may pun-
 8 ish for contempt any person who uses any menacing word,
 9 sign, or gesture in its presence, or who disturbs its pro-
 10 ceedings by any riot or disorder.

11 **“§ 950jjj. Perjury and obstruction of justice**

12 “A military commission under this chapter may try
 13 offenses and impose such punishment as the military com-
 14 mission may direct for perjury, false testimony, or ob-
 15 struction of justice related to the military commission.”.

16 (2) TABLES OF CHAPTERS AMENDMENTS.—The
 17 tables of chapters at the beginning of subtitle A and
 18 part II of subtitle A of title 10, United States Code,
 19 are each amended by inserting after the item relat-
 20 ing to chapter 47 the following new item:

“Chapter 47A. Military Commissions 948a.”.

21 (b) SUBMITTAL OF PROCEDURES TO CONGRESS.—

22 (1) SUBMITTAL OF PROCEDURES.—Not later
 23 than 90 days after the date of the enactment of this
 24 Act, the Secretary of Defense shall submit to the
 25 Committees on Armed Services of the Senate and

1 the House of Representatives a report setting forth
2 the procedures for military commissions prescribed
3 under chapter 47A of title 10, United States Code
4 (as added by subsection (a)).

5 (2) SUBMITTAL OF MODIFICATIONS.—Not later
6 than 60 days before the date on which any proposed
7 modification of the procedures described in para-
8 graph (1) shall go into effect, the Secretary shall
9 submit to the committees of Congress referred to in
10 that paragraph a report describing such modifica-
11 tion.

12 **SEC. 105. AMENDMENTS TO OTHER LAWS.**

13 (a) DETAINEE TREATMENT ACT OF 2005.—Section
14 1004(b) of the Detainee Treatment Act of 2005 (title X
15 of Public Law 109–148; 119 Stat. 2740; 42 U.S.C.
16 200dd–1(b)) is amended—

17 (1) by striking “may provide” and inserting
18 “shall provide”;

19 (2) by inserting “or investigation” after “crimi-
20 nal prosecution”; and

21 (3) by inserting “whether before United States
22 courts or agencies, foreign courts or agencies, or
23 international courts or agencies,” after “described in
24 that subsection,”.

1 (b) UNIFORM CODE OF MILITARY JUSTICE.—Chapter
2 ter 47 of title, 10, United States Code (the Uniform Code
3 of Military Justice), is amended as follows:

4 (1) Section 802 (article 2 of the Uniform Code
5 of Military Justice) is amended by adding at the end
6 the following new paragraph:

7 “(13) Lawful enemy combatants (as that term
8 is defined in section 948a(3) of this title) who vio-
9 late the law of war.”.

10 (2) Section 821 (article 21 of the Uniform Code
11 of Military Justice) is amended by striking “by stat-
12 ute or law of war”.

13 (3) Section 836(a) (article 36(a) of the Uniform
14 Code of Military Justice) is amended by inserting
15 “(other than military commissions under chapter
16 47A of this title)” after “other military tribunals”.

17 (c) PUNITIVE ARTICLE OF CONSPIRACY.—Section
18 881 of title 10, United States Code (article 81 of the Uni-
19 form Code of Military Justice)), is amended—

20 (1) by inserting “(a)” before “Any person”; and

21 (2) by adding at the end the following new sub-
22 section:

23 “(b) Any person subject to this chapter or chapter
24 47A of this title who conspires with any other person to
25 commit an offense under the law of war, and who know-

1 ingly does an overt act to effect the object of the con-
 2 spiracy, shall be punished, if death results to one or more
 3 of the victims, by death or such other punishment as a
 4 court-martial or military commission may direct, and, if
 5 death does not result to any of the victims, by such pun-
 6 ishment, other than death, as a court-martial or military
 7 commission may direct.”.

8 (d) REVIEW OF JUDGMENTS OF MILITARY COMMIS-
 9 SIONS.—

10 (1) REVIEW BY SUPREME COURT.—Section
 11 1259 of title 28, United States Code, is amended by
 12 adding at the end the following new paragraph:

13 “(5) Cases tried by military commission and re-
 14 viewed by the United States Court of Appeals for
 15 the District of Columbia Circuit under section 950g
 16 of title 10.”.

17 (2) DETAINEE TREATMENT ACT OF 2005.—Sec-
 18 tion 1005(e)(3) of the Detainee Treatment Act of
 19 2005 (title X of Public Law 109–148; 119 Stat.
 20 2740; 10 U.S.C. 801 note) is amended—

21 (A) in subparagraph (A), by striking
 22 “pursuant to Military Commission Order
 23 No. 1. dated August 31, 2005 (or any suc-
 24 cessor military order)” and inserting “by a

1 military commission under chapter 47A of
 2 title 10, United States Code”;

3 (B) by striking subparagraph (B) and
 4 inserting the following new subparagraph
 5 (B):

6 “(B) GRANT OF REVIEW.—Review under
 7 this paragraph shall be as of right.”;

8 (C) in subparagraph (C)—

9 (i) in clause (i)—

10 (I) by striking “pursuant to
 11 the military order” and inserting
 12 “by a military commission”; and

13 (II) by striking “at Guanta-
 14 namo Bay, Cuba”; and

15 (ii) in clause (ii), by striking
 16 “pursuant to such military order” and
 17 inserting “by the military commis-
 18 sion”; and

19 (D) in subparagraph (D)(i), by strik-
 20 ing “specified in the military order” and
 21 inserting “specified for a military commis-
 22 sion”.

23 **SEC. 106. HABEAS CORPUS MATTERS.**

24 (a) IN GENERAL.—Section 2241 of title 28, United
 25 States Code, is amended—

1 (1) by striking subsection (e) (as added by sec-
2 tion 1005(e)(1) of Public Law 109–148 (119 Stat.
3 2742)) and by striking subsection (e) (as added by
4 added by section 1405(e)(1) of Public Law 109–163
5 (119 Stat. 3477)); and

6 (2) by adding at the end the following new sub-
7 section:

8 “(e)(1) No court, justice, or judge shall have jurisdic-
9 tion to hear or consider an application for a writ of habeas
10 corpus filed by or on behalf of an alien detained by the
11 United States who—

12 “(A) is currently in United States custody; and

13 “(B) has been determined by the United States
14 to have been properly detained as an enemy combat-
15 ant or is awaiting such determination.

16 “(2) Except as provided in paragraphs (2) and (3)
17 of section 1005(e) of the Detainee Treatment Act of 2005
18 (10 U.S.C. 801 note), no court, justice, or judge shall have
19 jurisdiction to hear or consider any other action against
20 the United States or its agents relating to any aspect of
21 the detention, transfer, treatment, trial, or conditions of
22 confinement of an alien detained by the United States
23 who—

24 “(A) is currently in United States custody; and

1 “(B) has been determined by the United States
2 to have been properly detained as an enemy combat-
3 ant or is awaiting such determination.”.

4 (b) **EFFECTIVE DATE.**—The amendments made by
5 subsection (a) shall take effect on the date of the enact-
6 ment of this Act, and shall apply to all cases, without ex-
7 ception, pending on or after the date of the enactment of
8 this Act which relate to any aspect of the detention, trans-
9 fer, treatment, trial, or conditions of detention of an alien
10 detained by the United States since September 11, 2001.

11 **SEC. 107. TREATY OBLIGATIONS NOT ESTABLISHING**
12 **GROUND FOR CERTAIN CLAIMS.**

13 (a) **IN GENERAL.**—No person may invoke the Geneva
14 Conventions, or any protocols thereto, in any habeas or
15 civil action or proceeding to which the United States, or
16 a current or former officer, employee, member of the
17 Armed Forces, or other agent of the United States, is a
18 party, as a source of rights in any court of the United
19 States or its States or territories.

20 (b) **GENEVA CONVENTIONS DEFINED.**—In this sec-
21 tion, the term “Geneva Conventions” means—

22 (1) the Convention for the Amelioration of the
23 Condition of the Wounded and Sick in Armed
24 Forces in the Field, done at Geneva August 12,
25 1949 (6 UST 3217);

1 (2) the Convention for the Amelioration of the
2 Condition of the Wounded, Sick, and Shipwrecked
3 Members of the Armed Forces at Sea, done at Gene-
4 va August 12, 1949 (6 UST 3217);

5 (3) the Convention Relative to the Treatment of
6 Prisoners of War, done at Geneva August 12, 1949
7 (6 UST 3316); and

8 (4) the Convention Relative to the Protection of
9 Civilian Persons in Time of War, done at Geneva
10 August 12, 1949 (6 UST 3516).

11 **SEC. 108. IMPLEMENTATION OF TREATY OBLIGATIONS.**

12 (a) IMPLEMENTATION OF TREATY OBLIGATIONS.—

13 (1) IN GENERAL.—The acts enumerated in sub-
14 section (d) of section 2441 of title 18, United States
15 Code, as added by subsection (b) of this section, and
16 in subsection (c) of this section, constitute violations
17 of common Article 3 of the Geneva Conventions pro-
18 hibited by United States law.

19 (2) PROHIBITION ON GRAVE BREACHES.—The
20 provisions of section 2441 of title 18, United States
21 Code, as amended by this section, fully satisfy the
22 obligation under Article 129 of the Third Geneva
23 Convention for the United States to provide effective
24 penal sanctions for grave breaches which are encom-
25 passed in common Article 3 in the context of an

1 armed conflict not of an international character. No
2 foreign or international source of law shall supply a
3 basis for a rule of decision in the courts of the
4 United States in interpreting the prohibitions enu-
5 merated in subsection (d) of such section 2441.

6 (3) INTERPRETATION BY THE PRESIDENT.—(A)
7 As provided by the Constitution and by this section,
8 the President has the authority for the United
9 States to interpret the meaning and application of
10 the Geneva Conventions and to promulgate higher
11 standards and administrative regulations for viola-
12 tions of treaty obligations which are not grave
13 breaches of the Geneva Conventions.

14 (B) The President shall issue interpretations
15 described by subparagraph (A) by Executive Order
16 published in the Federal Register.

17 (C) Any Executive Order published under this
18 paragraph shall be authoritative (as to non-grave
19 breach provisions of common Article 3) as a matter
20 of United States law, in the same manner as other
21 administrative regulations.

22 (D) Nothing in this section shall be construed
23 to affect the constitutional functions and responsibil-
24 ities of Congress and the judicial branch of the
25 United States.

1 (4) DEFINITIONS.—In this subsection:

2 (A) The term “Geneva Conventions”
3 means—

4 (i) the Convention for the Ameliora-
5 tion of the Condition of the Wounded and
6 Sick in Armed Forces in the Field, done at
7 Geneva August 12, 1949 (6 UST 3217);

8 (ii) the Convention for the Ameliora-
9 tion of the Condition of the Wounded,
10 Sick, and Shipwrecked Members of the
11 Armed Forces at Sea, done at Geneva Au-
12 gust 12, 1949 (6 UST 3217);

13 (iii) the Convention Relative to the
14 Treatment of Prisoners of War, done at
15 Geneva August 12, 1949 (6 UST 3316);
16 and

17 (iv) the Convention Relative to the
18 Protection of Civilian Persons in Time of
19 War, done at Geneva August 12, 1949 (6
20 UST 3516).

21 (B) The term “Third Geneva Convention”
22 means the international convention referred to
23 in subparagraph (A)(iii).

24 (b) REVISION TO WAR CRIMES OFFENSE UNDER
25 FEDERAL CRIMINAL CODE.—

1 (1) IN GENERAL.—Section 2441 of title 18,
2 United States Code, is amended—

3 (A) in subsection (c), by striking para-
4 graph (3) and inserting the following new para-
5 graph (3):

6 “(3) which constitutes a grave breach of com-
7 mon Article 3 as defined in subsection (d) when
8 committed in the context of and in association with
9 an armed conflict not of an international character;
10 or”; and

11 (B) by adding at the end the following new
12 subsection:

13 “(d) COMMON ARTICLE 3 VIOLATIONS.—

14 “(1) PROHIBITED CONDUCT.—In subsection
15 (c)(3), the term ‘grave breach of common Article 3’
16 means any conduct (such conduct constituting a
17 grave breach of common Article 3 of the inter-
18 national conventions done at Geneva August 12,
19 1949), as follows:

20 “(A) TORTURE.—The act of a person who
21 commits, or conspires or attempts to commit,
22 an act specifically intended to inflict severe
23 physical or mental pain or suffering (other than
24 pain or suffering incidental to lawful sanctions)
25 upon another person within his custody or

1 physical control for the purpose of obtaining in-
2 formation or a confession, punishment, intimi-
3 dation, coercion, or any reason based on dis-
4 crimination of any kind.

5 “(B) CRUEL OR INHUMAN TREATMENT.—

6 The act of a person who commits, or conspires
7 or attempts to commit, an act intended to in-
8 flict severe or serious physical or mental pain or
9 suffering (other than pain or suffering inci-
10 dental to lawful sanctions), including serious
11 physical abuse, upon another within his custody
12 or control.

13 “(C) PERFORMING BIOLOGICAL EXPERI-

14 MENTS.—The act of a person who subjects, or
15 conspires or attempts to subject, one or more
16 persons within his custody or physical control to
17 biological experiments without a legitimate med-
18 ical or dental purpose and in so doing endan-
19 gers the body or health of such person or per-
20 sons.

21 “(D) MURDER.—The act of a person who

22 intentionally kills, or conspires or attempts to
23 kill, or kills whether intentionally or uninten-
24 tionally in the course of committing any other
25 offense under this subsection, one or more per-

1 sons taking no active part in the hostilities, in-
2 cluding those placed out of combat by sickness,
3 wounds, detention, or any other cause.

4 “(E) MUTILATION OR MAIMING.—The act
5 of a person who intentionally injures, or con-
6 spires or attempts to injure, or injures whether
7 intentionally or unintentionally in the course of
8 committing any other offense under this sub-
9 section, one or more persons taking no active
10 part in the hostilities, including those placed
11 out of combat by sickness, wounds, detention,
12 or any other cause, by disfiguring the person or
13 persons by any mutilation thereof or by perma-
14 nently disabling any member, limb, or organ of
15 his body, without any legitimate medical or den-
16 tal purpose.

17 “(F) INTENTIONALLY CAUSING SERIOUS
18 BODILY INJURY.—The act of a person who in-
19 tentiously causes, or conspires or attempts to
20 cause, serious bodily injury to one or more per-
21 sons, including lawful combatants, in violation
22 of the law of war.

23 “(G) RAPE.—The act of a person who
24 forcibly or with coercion or threat of force
25 wrongfully invades, or conspires or attempts to

1 invade, the body of a person by penetrating,
 2 however slightly, the anal or genital opening of
 3 the victim with any part of the body of the ac-
 4 cused, or with any foreign object.

5 “(H) SEXUAL ASSAULT OR ABUSE.—The
 6 act of a person who forcibly or with coercion or
 7 threat of force engages, or conspires or at-
 8 tempts to engage, in sexual contact with one or
 9 more persons, or causes, or conspires or at-
 10 tempts to cause, one or more persons to engage
 11 in sexual contact.

12 “(I) TAKING HOSTAGES.—The act of a
 13 person who, having knowingly seized or de-
 14 tained one or more persons, threatens to kill,
 15 injure, or continue to detain such person or per-
 16 sons with the intent of compelling any nation,
 17 person other than the hostage, or group of per-
 18 sons to act or refrain from acting as an explicit
 19 or implicit condition for the safety or release of
 20 such person or persons.

21 “(2) DEFINITIONS.—In the case of an offense
 22 under subsection (a) by reason of subsection
 23 (c)(3)—

24 “(A) the term ‘severe mental pain or suf-
 25 fering’ shall be applied for purposes of para-

1 graphs (1)(A) and (1)(B) in accordance with
2 the meaning given that term in section 2340(2)
3 of this title;

4 “(B) the term ‘serious bodily injury’ shall
5 be applied for purposes of paragraph (1)(F) in
6 accordance with the meaning given that term in
7 section 113(b)(2) of this title;

8 “(C) the term ‘sexual contact’ shall be ap-
9 plied for purposes of paragraph (1)(G) in ac-
10 cordance with the meaning given that term in
11 section 2246(3) of this title;

12 “(D) the term ‘serious physical pain or
13 suffering’ shall be applied for purposes of para-
14 graph (1)(B) as meaning bodily injury that in-
15 volves—

16 “(i) a substantial risk of death;

17 “(ii) extreme physical pain;

18 “(iii) a burn or physical disfigurement
19 of a serious nature (other than cuts, abra-
20 sions, or bruises); or

21 “(iv) significant loss or impairment of
22 the function of a bodily member, organ, or
23 mental faculty; and

24 “(E) the term ‘serious mental pain or suf-
25 fering’ shall be applied for purposes of para-

graph (1)(B) in accordance with the meaning given the term ‘severe mental pain or suffering’ (as defined in section 2340(2) of this title), except that—

“(i) the term ‘serious’ shall replace the term ‘severe’ where it appears; and

“(ii) as to conduct occurring after the date of the enactment of the Military Commission Act of 2006, the term ‘serious and non-transitory mental harm (which need not be prolonged)’ shall replace the term ‘prolonged mental harm’ where it appears.

“(3) INAPPLICABILITY OF CERTAIN PROVISIONS WITH RESPECT TO COLLATERAL DAMAGE OR INCIDENT OF LAWFUL ATTACK.—The intent specified for the conduct stated in subparagraphs (D), (E), and (F) or paragraph (1) precludes the applicability of those subparagraphs to an offense under subsection (a) by reasons of subsection (c)(3) with respect to—

“(A) collateral damage; or

“(B) death, damage, or injury incident to a lawful attack.

“(4) INAPPLICABILITY OF TAKING HOSTAGES TO PRISONER EXCHANGE.—Paragraph (1)(I) does not apply to an offense under subsection (a) by rea-

1 son of subsection (c)(3) in the case of a prisoner ex-
 2 change during wartime.”.

3 (2) RETROACTIVE APPLICABILITY.—The
 4 amendments made by this subsection, except as
 5 specified in subsection (d)(2)(E) of section 2441 of
 6 title 18, United States Code, shall take effect as of
 7 November 26, 1997, as if enacted immediately after
 8 the amendments made by section 583 of Public Law
 9 105–118 (as amended by section 4002(e)(7) of Pub-
 10 lic Law 107–273).

11 (c) ADDITIONAL PROHIBITION ON CRUEL, INHUMAN,
 12 OR DEGRADING TREATMENT OR PUNISHMENT.—

13 (1) IN GENERAL.—No individual in the custody
 14 or under the physical control of the United States
 15 Government, regardless of nationality or physical lo-
 16 cation, shall be subject to cruel, inhuman, or degrad-
 17 ing treatment or punishment.

18 (2) CRUEL, INHUMAN, OR DEGRADING TREAT-
 19 MENT OR PUNISHMENT DEFINED.—In this sub-
 20 section, the term “cruel, inhuman, or degrading
 21 treatment or punishment” means cruel, unusual,
 22 and inhumane treatment or punishment prohibited
 23 by the Fifth, Eighth, and Fourteenth Amendments
 24 to the Constitution of the United States, as defined
 25 in the United States Reservations, Declarations and

1 Understandings to the United Nations Convention
2 Against Torture and Other Forms of Cruel, Inhu-
3 man or Degrading Treatment or Punishment done
4 at New York, December 10, 1984.

5 (3) COMPLIANCE.—The President shall take ap-
6 propriate action to ensure compliance with this sub-
7 section, including through the establishment of ad-
8 ministrative rules and procedures.

9 **SEC. 109. DETENTION COVERED BY REVIEW OF DECISIONS**
10 **OF COMBATANT STATUS REVIEW TRIBUNALS**
11 **OF PROPRIETY OF DETENTION.**

12 Section 1005(e)(2)(B)(i) of the Detainee Treatment
13 Act of 2005 (title X of Public Law 109–148; 119 Stat.
14 2742; 10 U.S.C. 801 note) is amended by striking “the
15 Department of Defense at Guantanamo Bay, Cuba” and
16 inserting “the United States”.

17 **SEC. 110. SEVERABILITY.**

18 If any provision of this Act or amendment made by
19 a provision of this Act, or the application of such provision
20 or amendment to any person or circumstance, is held to
21 be unconstitutional, the remainder of this Act and the
22 amendments made by this Act, and the application of such
23 provisions and amendments to any other person or cir-
24 cumstance, shall not be affected thereby.

TITLE II—TERRORIST SURVEILLANCE ACT

SEC. 201. SHORT TITLE.

This title may be cited as the “Terrorist Surveillance Act of 2006”.

SEC. 202. FINDINGS.

Congress finds the following:

(1) After the terrorist attacks of September 11, 2001, President Bush authorized the National Security Agency to intercept communications between people inside the United States, including American citizens, and terrorism suspects overseas.

(2) One of the lessons learned from September 11, 2001, is that the enemies who seek to greatly harm and terrorize our Nation utilize technologies and techniques that defy conventional law enforcement practices.

(3) The President, as the constitutional officer most directly responsible for protecting the United States from attack, requires the ability and means to detect and track an enemy that can master and exploit modern technology.

(4) It is equally essential, however, that in protecting the United States against our enemies, the President does not compromise the very civil lib-

1 erties that he seeks to safeguard. As Justice Hugo
2 Black observed, “The President’s power, if any, to
3 issue [an] order must stem either from an Act of
4 Congress or from the Constitution itself.” *Youngs-*
5 *town Sheet & Tube Co. v. Sawyer*, 343 U.S. 579,
6 585 (1952) (opinion by Black, J.). Similarly, in
7 2004, Justice Sandra Day O’Connor explained in
8 her plurality opinion for the Supreme Court in
9 *Hamdi v. Rumsfeld*: “We have long since made clear
10 that a state of war is not a blank check for the
11 President when it comes to the rights of the Na-
12 tion’s citizens.” *Hamdi v. Rumsfeld*, 542 U.S. 507,
13 536 (2004) (citations omitted).

14 (5) When deciding issues of national security, it
15 is in our Nation’s best interest that, to the extent
16 feasible, all 3 branches of the Federal Government
17 should be involved. This helps guarantee that elec-
18 tronic surveillance programs do not infringe on the
19 constitutional rights of Americans, while at the same
20 time ensuring that the President has all the powers
21 and means necessary to detect and track our en-
22 emies and protect our Nation from attack.

23 (6) As Justice Sandra Day O’Connor explained
24 in her plurality opinion for the Supreme Court in
25 *Hamdi v. Rumsfeld*, “Whatever power the United

1 States Constitution envisions for the Executive in its
2 exchanges with other nations or with enemy organi-
3 zations in times of conflict, it most assuredly envi-
4 sions a role for all 3 branches when individual lib-
5 erties are at stake.” Hamdi v. Rumsfeld, 542 U.S.
6 507, 536 (2004) (citations omitted).

7 (7) Similarly, Justice Jackson famously ex-
8 plained in his Youngstown concurrence: “When the
9 President acts pursuant to an express or implied au-
10 thorization of Congress, his authority is at its max-
11 imum, for it includes all that he possesses in his own
12 right plus all that Congress can delegate ... When
13 the President acts in absence of either a congres-
14 sional grant or denial of authority, he can only rely
15 upon his own independent powers, but there is a
16 zone of twilight in which he and Congress may have
17 concurrent authority, or in which its distribution is
18 uncertain. Therefore, congressional inertia, indiffer-
19 ence or quiescence may sometimes, at least as a
20 practical matter, enable, if not invite, measures on
21 independent presidential responsibility ... When the
22 President takes measures incompatible with the ex-
23 pressed or implied will of Congress, his power is at
24 its lowest ebb, for then he can rely only upon his
25 own constitutional powers minus any constitutional

1 powers of Congress over the matter. Courts can sus-
 2 tain exclusive Presidential control in such a case
 3 only by disabling the Congress from acting upon the
 4 subject.” *Youngstown Sheet & Tube Co. v. Sawyer*,
 5 343 U.S. 579, 635–38 (1952) (Jackson, J., concur-
 6 ring).

7 (8) Congress clearly has the authority to enact
 8 legislation with respect to electronic surveillance pro-
 9 grams. The Constitution provides Congress with
 10 broad powers of oversight over national security and
 11 foreign policy, under article I, section 8 of the Con-
 12 stitution of the United States, which confers on Con-
 13 gress numerous powers, including the powers—

14 (A) “To declare War, grant Letters of
 15 Marque and Reprisal, and make Rules con-
 16 cerning Captures on Land and Water”;

17 (B) “To raise and support Armies”;

18 (C) “To provide and maintain a Navy”;

19 (D) “To make Rules for the Government
 20 and Regulation of the land and naval Forces”;

21 (E) “To provide for calling forth the Mili-
 22 tia to execute the Laws of the Union, suppress
 23 Insurrections and repel Invasions”; and

24 (F) “To provide for organizing, arming,
 25 and disciplining the Militia, and for governing

1 such Part of them as may be employed in the
2 Service of the United States”.

3 (9) While Attorney General Alberto Gonzales
4 explained that the executive branch reviews the elec-
5 tronic surveillance program of the National Security
6 Agency every 45 days to ensure that the program is
7 not overly broad, it is the belief of Congress that ap-
8 proval and supervision of electronic surveillance pro-
9 grams should be conducted outside of the executive
10 branch, by the article III court established under
11 section 103 of the Foreign Intelligence Surveillance
12 Act of 1978 (50 U.S.C. 1803) and the congressional
13 intelligence committees. It is also the belief of Con-
14 gress that it is appropriate for an article III court
15 to pass upon the constitutionality of electronic sur-
16 veillance programs that may be directed at Ameri-
17 cans.

18 (10) The Foreign Intelligence Surveillance
19 Court is the proper court to approve and supervise
20 classified electronic surveillance programs because it
21 is adept at maintaining the secrecy with which it
22 was charged and it possesses the requisite expertise
23 and discretion for adjudicating sensitive issues of
24 national security.

1 (11) In 1975, [then] Attorney General Edward
2 Levi, a strong defender of executive authority, testi-
3 fied that in times of conflict, the President needs the
4 power to conduct long-range electronic surveillance
5 and that a foreign intelligence surveillance court
6 should be empowered to issue special approval orders
7 in these circumstances.

8 (12) Granting the Foreign Intelligence Surveil-
9 lance Court the authority to review electronic sur-
10 veillance programs and pass upon their constitu-
11 tionality is consistent with well-established, long-
12 standing practices.

13 (13) The Foreign Intelligence Surveillance
14 Court already has broad authority to approve sur-
15 veillance of members of international conspiracies, in
16 addition to granting warrants for surveillance of a
17 particular individual under sections 104, 105, and
18 402 of the Foreign Intelligence Surveillance Act of
19 1978 (50 U.S.C. 1804, 1805, and 1842).

20 (14) Prosecutors have significant flexibility in
21 investigating domestic conspiracy cases. Courts have
22 held that flexible warrants comply with the 4th
23 amendment to the Constitution of the United States
24 when they relate to complex, far-reaching, and
25 multifaceted criminal enterprises like drug conspir-

1 acies and money laundering rings. The courts recog-
2 nize that applications for search warrants must be
3 judged in a common sense and realistic fashion, and
4 the courts permit broad warrant language where,
5 due to the nature and circumstances of the inves-
6 tigation and the criminal organization, more precise
7 descriptions are not feasible.

8 (15) The Supreme Court, in the “Keith Case”,
9 United States v. United States District Court for
10 the Eastern District of Michigan, 407 U.S. 297
11 (1972), recognized that the standards and proce-
12 dures used to fight ordinary crime may not be appli-
13 cable to cases involving national security. The Court
14 recognized that national “security surveillance may
15 involve different policy and practical considerations
16 from the surveillance of ordinary crime” and that
17 courts should be more flexible in issuing warrants in
18 national security cases. United States v. United
19 States District Court for the Eastern District of
20 Michigan, 407 U.S. 297, 322 (1972).

21 (16) By authorizing the Foreign Intelligence
22 Surveillance Court to review electronic surveillance
23 programs, Congress enables the President to use the
24 necessary means to guard our national security,

1 while also protecting the civil liberties and constitu-
2 tional rights that we cherish.

3 **SEC. 203. DEFINITIONS.**

4 The Foreign Intelligence Surveillance Act of 1978
5 (50 U.S.C. 1801 et seq.) is amended—

6 (1) by redesignating title VII as title VIII;

7 (2) by redesignating section 701 as section 801;

8 and

9 (3) by inserting after title VI the following:

10 **“TITLE VII—ELECTRONIC**
11 **SURVEILLANCE PROGRAMS**

12 **“SEC. 701. DEFINITIONS.**

13 “As used in this title—

14 “(1) the terms ‘agent of a foreign power’, ‘At-
15 torney General’, ‘contents’, ‘electronic surveillance’,
16 ‘foreign power’, ‘international terrorism’, ‘minimiza-
17 tion procedures’, ‘person’, ‘United States’, and
18 ‘United States person’ have the same meaning as in
19 section 101;

20 “(2) the term ‘congressional intelligence com-
21 mittees’ means the Select Committee on Intelligence
22 of the Senate and the Permanent Select Committee
23 on Intelligence of the House of Representatives;

1 “(3) the term ‘electronic surveillance program’
2 means a program to engage in electronic surveil-
3 lance—

4 “(A) that has as a significant purpose the
5 gathering of foreign intelligence information or
6 protecting against international terrorism;

7 “(B) where it is not feasible to name every
8 person, address, or location to be subjected to
9 electronic surveillance;

10 “(C) where effective gathering of foreign
11 intelligence information requires the flexibility
12 to begin electronic surveillance immediately
13 after learning of suspect activity; and

14 “(D) where effective gathering of foreign
15 intelligence information requires an extended
16 period of electronic surveillance;

17 “(4) the term ‘foreign intelligence information’
18 has the same meaning as in section 101(e) and in-
19 cludes information necessary to protect against
20 international terrorism;

21 “(5) the term ‘Foreign Intelligence Surveillance
22 Court’ means the court established under section
23 103(a); and

1 “(6) the term ‘Foreign Intelligence Surveillance
2 Court of Review’ means the court established under
3 section 103(b).”.

4 **SEC. 204. FOREIGN INTELLIGENCE SURVEILLANCE COURT**
5 **JURISDICTION TO REVIEW ELECTRONIC SUR-**
6 **VEILLANCE PROGRAMS.**

7 (a) IN GENERAL.—Title VII of the Foreign Intel-
8 ligence Surveillance Act of 1978, as amended by section
9 3, is amended by adding at the end the following:

10 **“SEC. 702. FOREIGN INTELLIGENCE SURVEILLANCE COURT**
11 **JURISDICTION TO REVIEW ELECTRONIC SUR-**
12 **VEILLANCE PROGRAMS.**

13 “(a) AUTHORIZATION OF REVIEW.—

14 “(1) INITIAL AUTHORIZATION.—The Foreign
15 Intelligence Surveillance Court shall have jurisdic-
16 tion to issue an order under this title, lasting not
17 longer than 90 days, that authorizes an electronic
18 surveillance program to obtain foreign intelligence
19 information or to protect against international ter-
20 rorism.

21 “(2) REAUTHORIZATION.—The Foreign Intel-
22 ligence Surveillance Court shall have jurisdiction to
23 reauthorize an electronic surveillance program for a
24 period of time not longer than such court determines
25 to be reasonable. There shall be no limit on the

1 number of times the Attorney General may seek re-
2 authorization of an electronic surveillance program.

3 “(3) RESUBMISSION OR APPEAL.—In the event
4 that the Foreign Intelligence Surveillance Court re-
5 fuses to approve an application under this sub-
6 section, the court shall state its reasons in a written
7 opinion, which it shall submit to the Attorney Gen-
8 eral. The Attorney General or his designee may sub-
9 mit a new application under section 703 for the elec-
10 tronic surveillance program, with no limit on the
11 number of resubmissions that may be made. Alter-
12 natively, the Attorney General may appeal the deci-
13 sion of the Foreign Intelligence Surveillance Court
14 to the Foreign Intelligence Surveillance Court of Re-
15 view.

16 “(4) CONTINUED SURVEILLANCE UNDER TITLE
17 I.—

18 “(A) IN GENERAL.—If, at any time, the
19 Attorney General determines that the known
20 facts and circumstances relating to any target
21 within the United States under this title satisfy
22 the criteria for an application under section 104
23 for an order for electronic surveillance of the
24 target under section 105, the Attorney General
25 shall—

1 “(i) discontinue the surveillance of the
2 target under this title; or

3 “(ii) continue the surveillance of the
4 target under this title, subject to the re-
5 quirements of subparagraph (B).

6 “(B) CONTINUATION OF SURVEILLANCE.—

7 “(i) IN GENERAL.—The Attorney
8 General may continue surveillance of a tar-
9 get under this title as specified in subpara-
10 graph (A)(ii) only if the Attorney General
11 makes an application under section 104 for
12 an order for electronic surveillance of the
13 target under section 105 as soon as the
14 Attorney General determines practicable
15 after the date on which the Attorney Gen-
16 eral makes the determination to continue
17 surveillance of the target under subpara-
18 graph (A)(ii).

19 “(ii) PERIOD.—The period during
20 which the Attorney General may continue
21 surveillance of a target under this title
22 after the Attorney General has determined
23 that making an application is practicable
24 shall be limited to a reasonable period, as
25 determined by the Attorney General, dur-

1 ing which the application is prepared and
2 the period during which the application of
3 the Attorney General under section 104 for
4 an order for electronic surveillance of the
5 target under section 105 is pending under
6 title I, including during any period in
7 which appeal from the denial of the appli-
8 cation is pending with the Foreign Intel-
9 ligence Surveillance Court of Review or the
10 Supreme Court under section 103(b).

11 “(b) MANDATORY TRANSFER FOR REVIEW.—

12 “(1) IN GENERAL.—In any case before any
13 court challenging the legality of classified commu-
14 nications intelligence activity relating to a foreign
15 threat, including an electronic surveillance program,
16 or in which the legality of any such activity or pro-
17 gram is in issue, if the Attorney General files an af-
18 fidavit under oath that the case should be trans-
19 ferred to the Foreign Intelligence Surveillance Court
20 of Review because further proceedings in the origi-
21 nating court would harm the national security of the
22 United States, the originating court shall transfer
23 the case of the Foreign Intelligence Surveillance for
24 further proceedings under this subsection.

1 “(2) PROCEDURES FOR REVIEW.—The Foreign
2 Intelligence Surveillance Court shall have jurisdic-
3 tion as appropriate to determine standing and the
4 legality of the program to the extent necessary for
5 resolution of the underlying case. All proceedings
6 under this paragraph shall be conducted in accord-
7 ance with the procedures set forth in section 106(f).
8 In the event the Foreign Intelligence Surveillance
9 Court determines that, in the context of a criminal
10 proceeding, the Constitution of the United States
11 would require the disclosure of national security in-
12 formation, any such constitutionally required disclo-
13 sure shall be governed by the Classified Information
14 Procedures Act, (18 U.S.C. App.), or if applicable,
15 section 2339B(f) of title 18, United States Code.

16 “(3) APPEAL, CERTIORARI, AND EFFECTS OF
17 DECISIONS.—The decision of the Foreign Intel-
18 ligence Surveillance Court made under paragraphs
19 (1) and (2), including a decision that the disclosure
20 of national security information is constitutionally
21 required, shall be subject to review by the Foreign
22 Intelligence Surveillance Court of Review under sec-
23 tion 103(b). The Supreme Court of the United
24 States shall have jurisdiction to review decisions of
25 the Foreign Intelligence Surveillance Court of Re-

1 view by writ of certiorari granted upon the petition
2 of the United States. The decision by the Foreign
3 Intelligence Surveillance Court shall otherwise be
4 binding in all other courts.

5 “(4) DISMISSAL.—The Foreign Intelligence
6 Surveillance Court or a court that is an originating
7 court under paragraph (1) may dismiss a challenge
8 to the legality of an electronic surveillance program
9 for any reason provided for under law.

10 “(5) PRESERVATION OF LITIGATION PRIVI-
11 LEGES.—Nothing in this Act shall be construed to
12 abrogate, limit, or affect any litigation privileges in
13 any court.”.

14 **SEC. 205. APPLICATIONS FOR APPROVAL OF ELECTRONIC**
15 **SURVEILLANCE PROGRAMS.**

16 Title VII of the Foreign Intelligence Surveillance Act
17 of 1978, as amended by section 4, is amended by adding
18 at the end the following:

19 **“SEC. 703. APPLICATIONS FOR APPROVAL OF ELECTRONIC**
20 **SURVEILLANCE PROGRAMS.**

21 “(a) IN GENERAL.—Each application for approval of
22 an electronic surveillance program under this title (includ-
23 ing resubmission or application for reauthorization)
24 shall—

1 “(1) be made by the Attorney General or his
2 designee;

3 “(2) include a statement of the authority con-
4 ferred on the Attorney General by the President of
5 the United States;

6 “(3) include a statement setting forth the legal
7 basis for the conclusion by the Attorney General
8 that the electronic surveillance program is consistent
9 with the Constitution of the United States;

10 “(4) certify that a significant purpose of the
11 electronic surveillance program is to obtain foreign
12 intelligence information or to protect against inter-
13 national terrorism;

14 “(5) certify that the information sought cannot
15 reasonably be obtained by normal investigative tech-
16 niques

17 “(6) certify that the information sought cannot
18 reasonably be obtained through an application under
19 section 104;

20 “(7) include a statement of the means and
21 operational procedures by which the electronic sur-
22 veillance will be executed and effected;

23 “(8) include an explanation of how the elec-
24 tronic surveillance program is reasonably designed to

1 ensure that the communications that are acquired
2 are communications of or with—

3 “(A) a foreign power that engages in inter-
4 national terrorism or activities in preparation
5 therefor;

6 “(B) an agent of a foreign power that en-
7 gages in international terrorism or activities in
8 preparation therefor;

9 “(C) a person reasonably believed to have
10 communication with or be associated with a for-
11 eign power that engages in international ter-
12 rorism or activities in preparation therefor or
13 an agent of a foreign power that engages in
14 international terrorism or activities in prepara-
15 tion therefor; or

16 “(D) a foreign power that poses an immi-
17 nent threat of attack likely to cause death, seri-
18 ous injury, or substantial economic damage to
19 the United States, or an agent of a foreign
20 power thereof;

21 “(9) include a statement of the proposed mini-
22 mization procedures;

23 “(9) include a statement of the proposed mini-
24 mization procedures;

1 “(10) if the electronic surveillance program that
2 is the subject of the application was initiated prior
3 to the date the application was submitted, specify
4 the date that the program was initiated;

5 “(11) include a description of all previous appli-
6 cations that have been made under this title involv-
7 ing the electronic surveillance program in the appli-
8 cation (including the minimization procedures and
9 the means and operational procedures proposed) and
10 the decision on each previous application; and

11 “(12) include a statement of facts concerning
12 the implementation of the electronic surveillance pro-
13 gram described in the application, including, for any
14 period of operation of the program authorized not
15 less than 90 days prior to the date of submission of
16 the application—

17 “(A) the minimization procedures imple-
18 mented; and

19 “(B) the means and operational procedures
20 by which the electronic surveillance was exe-
21 cuted and effected.

22 “(b) ADDITIONAL INFORMATION.—The Foreign In-
23 telligence Surveillance Court may require the Attorney
24 General to furnish such other information as may be nec-
25 essary to make a determination under section 704.”.

1 **SEC. 206. APPROVAL OF ELECTRONIC SURVEILLANCE PRO-**
2 **GRAMS.**

3 Title VII of the Foreign Intelligence Surveillance Act
4 18 of 1978, as amended by section 5, is amended by add-
5 ing at the end the following:

6 **“SEC. 704. APPROVAL OF ELECTRONIC SURVEILLANCE**
7 **PROGRAMS.**

8 “(a) NECESSARY FINDINGS.—Upon receipt of an ap-
9 plication under section 703, the Foreign Intelligence Sur-
10 veillance Court shall enter an ex parte order as requested,
11 or as modified, approving the electronic surveillance pro-
12 gram if it finds that—

13 “(1) the President has authorized the Attorney
14 General to make the application for electronic sur-
15 veillance for foreign intelligence information or to
16 protect against international terrorism;

17 “(2) approval of the electronic surveillance pro-
18 gram in the application is consistent with the Con-
19 stitution of the United States;

20 “(3) the electronic surveillance program is rea-
21 sonably designed to ensure that the communications
22 that are acquired are communications of or with—

23 “(A) a foreign power that engages in inter-
24 national terrorism or activities in preparation
25 therefor;

1 “(B) an agent of a foreign power that is
2 engaged in international terrorism or activities
3 in preparation therefor;

4 “(C) a person reasonably believed to have
5 communication with or be associated with a for-
6 eign power that is engaged in international ter-
7 rorism or activities in preparation therefor or
8 an agent of a foreign power that is engaged in
9 international terrorism or activities in prepara-
10 tion therefor; or

11 “(D) a foreign power that poses an immi-
12 nent threat of attack likely to cause death, seri-
13 ous injury, or substantial economic damage to
14 the United States, or an agent of a foreign
15 power thereof;

16 “(4) the proposed minimization procedures
17 meet the definition of minimization procedures
18 under section 101(h); and

19 “(5) the application contains all statements and
20 certifications required by section 703.

21 “(b) CONSIDERATIONS.—In considering the constitu-
22 tionality of the electronic surveillance program under sub-
23 section (a), the Foreign Intelligence Surveillance Court
24 may consider—

1 “(1) whether the electronic surveillance pro-
2 gram has been implemented in accordance with the
3 proposal by the Attorney General, by comparing—

4 “(A) the minimization procedures proposed
5 with the minimization procedures actually im-
6 plemented;

7 “(B) the nature of the information sought
8 with the nature of the information actually ob-
9 tained; and

10 “(C) the means and operational procedures
11 proposed with the means and operational proce-
12 dures actually implemented; and

13 “(2) whether foreign intelligence information
14 has been obtained through the electronic surveillance
15 program.

16 “(c) CONTENTS OF ORDER.—An order approving an
17 electronic surveillance program under this section shall di-
18 rect—

19 “(1) that the minimization procedures be fol-
20 lowed;

21 “(2) that, upon the request of the applicant,
22 specified communication or other common carriers,
23 landlords, custodians, or other specified persons, fur-
24 nish the applicant forthwith with all information, fa-
25 cilities, or technical assistance necessary to under-

1 take the electronic surveillance program in such a
2 manner as will protect its secrecy and produce a
3 minimum of interference with the services that such
4 carriers, landlords, custodians, or other persons are
5 providing potential targets of the electronic surveil-
6 lance program;

7 “(3) that any records concerning the electronic
8 surveillance program or the aid furnished or retained
9 by such carriers, landlords, custodians, or other per-
10 sons are maintained under security procedures ap-
11 proved by the Attorney General and the Director of
12 National Intelligence; and

13 “(4) that the applicant compensate, at the pre-
14 vailing rate, such carriers, landlords, custodians, or
15 other persons for furnishing such aid.”.

16 **SEC. 207. CONGRESSIONAL OVERSIGHT.**

17 Title VII of the Foreign Intelligence Surveillance Act
18 of 1978, as amended by section 6, is amended by adding
19 at the end the following:

20 **“SEC. 705. CONGRESSIONAL OVERSIGHT.**

21 “(a) IN GENERAL.—Not less often than every 180
22 days, the Attorney General shall submit to the congres-
23 sional intelligence committees a report in classified form
24 on the activities during the previous 180-day period under

1 any electronic surveillance program authorized under this
2 title.

3 “(b) CONTENTS.—Each report submitted under sub-
4 section (a) shall provide, with respect to the previous 180-
5 day period, a description of—

6 “(1) the minimization procedures implemented;

7 “(2) the means and operational procedures by
8 which the electronic surveillance program was exe-
9 cuted and effected;

10 “(3) significant decisions of the Foreign Intel-
11 ligence Surveillance Court on applications made
12 under section 703;

13 “(4) the total number of applications made for
14 orders approving electronic surveillance programs
15 pursuant to this title; and

16 “(5) the total number of orders applied for that
17 have been granted, modified, or denied.

18 “(c) RULE OF CONSTRUCTION.—Nothing in this title
19 shall be construed to limit the authority or responsibility
20 of any committee of either House of Congress to obtain
21 such information as such committee may need to carry
22 out its respective functions and duties.”.

1 **SEC. 208. CLARIFICATION OF THE FOREIGN INTELLIGENCE**
2 **SURVEILLANCE ACT OF 1978.**

3 (a) REPEAL.—Sections 111, 309, and 404 of the
4 Foreign Intelligence Surveillance Act of 1978 (50 U.S.C.
5 1811, 1829, and 1844) are repealed.

6 (b) CLARIFYING AMENDMENTS.—

7 (1) TITLE 18.—Section 2511(2) of title 18,
8 United States Code, is amended—

9 (A) in paragraph (e), by striking “, as de-
10 fined in section 101” and all that follows
11 through the end of the paragraph and inserting
12 the following: “under the Constitution or the
13 Foreign Intelligence Surveillance Act of 1978.”;
14 and

15 (B) in paragraph (f), by striking “from
16 international or foreign communications,” and
17 all that follows through the end of the para-
18 graph and inserting “that is authorized under
19 a Federal statute or the Constitution of the
20 United States.”.

21 (2) FISA.—Section 109 of the Foreign Intel-
22 ligence Surveillance Act of 1978 (50 U.S.C. 1809)
23 is amended—

24 (A) in subsection (a)—

25 (i) in paragraph (1)—

1 (I) by striking “authorized by
 2 statute” and inserting “authorized by
 3 law”; and

4 (II) by striking “or” at the end;
 5 (ii) in paragraph (2)—

6 (I) by striking “authorized by
 7 statute” and inserting “authorized by
 8 law”; and

9 (II) by striking the period and
 10 inserting “; or”; and

11 (iii) by adding at the end the fol-
 12 lowing:

13 “(3) and knowingly discloses or uses informa-
 14 tion obtained under color of law by electronic sur-
 15 veillance in a manner or for a purpose not author-
 16 ized by law.”; and

17 (B) in subsection (c)—

18 (i) by striking “\$10,000” and insert-
 19 ing “\$100,000”; and

20 (ii) by striking “five years” and in-
 21 serting “15 years”.

22 **SEC. 209. MODERNIZING AMENDMENTS TO FISA.**

23 (a) REFERENCE.—In this section, a reference to
 24 “FISA” shall mean the Foreign Intelligence Surveillance
 25 Act of 1978 (50 U.S.C. 1801 et seq.).

1 (b) DEFINITIONS.—Section 101 of FISA (50 U.S.C.
2 1801) is amended—

3 (1) in subsection (b)(1)—

4 (A) in subparagraph (C), by striking “or”
5 after the semicolon; and

6 (B) by adding at the end the following:

7 “(D) otherwise is reasonably expected to
8 possess, control, transmit, or receive foreign in-
9 telligence information while that person is in
10 the United States, provided that the official
11 making the certification required by section
12 104(a)(6) deems such foreign intelligence infor-
13 mation to be significant; or”;

14 (2) by striking subsection (f) and inserting the
15 following:

16 “(f) ‘Electronic surveillance’ means—

17 “(1) the installation or use of an electronic, me-
18 chanical, or other surveillance device for acquiring
19 information by intentionally directing the surveil-
20 lance at a particular known person who is reason-
21 ably believed to be in the United States under cir-
22 cumstances in which that person has a reasonable
23 expectation of privacy and a warrant would be re-
24 quired for law enforcement purposes; or

1 “(2) the intentional acquisition of the contents
2 of any communication under circumstances in which
3 a person has a reasonable expectation of privacy and
4 a warrant would be required for law enforcement
5 purposes, and if both the sender and all intended re-
6 cipients are reasonably believed to be located within
7 the United States.”;

8 (3) in subsection (h), by striking paragraph (4)
9 and inserting the following:

10 “(4) notwithstanding paragraphs (1), (2), and
11 (3), with respect to any electronic surveillance ap-
12 proved pursuant to section 102 or 704, procedures
13 that require that no contents of any communication
14 originated or sent by a United States person shall
15 be disclosed, disseminated, used or retained for
16 longer than 7 days unless a court order under sec-
17 tion 105 is obtained or unless the Attorney General
18 determines that the information indicates a threat of
19 death or serious bodily harm to any person.”.

20 (4) by striking subsection (l); and

21 (5) by striking subsection (n) and inserting the
22 following:

23 “(n) ‘contents’, when used with respect to a commu-
24 nication, includes any information concerning the sub-
25 stance, symbols, sounds, words, purport, or meaning of a

1 communication, and does not include dialing, routing, ad-
2 dressing, or signaling information.”.

3 (c) ELECTRONIC SURVEILLANCE AUTHORIZATION.—
4 Section 102 of FISA (50 U.S.C. 1802) is amended to read
5 as follows:

6 “ELECTRONIC SURVEILLANCE AUTHORIZATION WITHOUT
7 COURT ORDER; CERTIFICATION BY ATTORNEY GEN-
8 ERAL; REPORTS TO CONGRESSIONAL COMMITTEES;
9 TRANSMITTAL UNDER SEAL; DUTIES AND COM-
10 PENSATION OF COMMUNICATION COMMON CARRIER;
11 APPLICATIONS; JURISDICTION OF COURT

12 “SEC. 102. (a)(1) Notwithstanding any other law, the
13 President through the Attorney General, may authorize
14 electronic surveillance without a court order under this
15 title to acquire foreign intelligence information for periods
16 of up to 1 year if the Attorney General certifies in writing
17 under oath that the electronic surveillance is directed at—

18 “(A)(i) the acquisition of the contents of com-
19 munications of foreign powers, as defined in para-
20 graph (1), (2), or (3) of section 101(a), or a person
21 other than a United States person acting as an
22 agent of a foreign power, as defined in section
23 101(b)(1)(A) or (B); or

24 “(ii) the acquisition of technical intelligence,
25 other than the spoken communications of individ-
26 uals, from property or premises under the open and

1 exclusive control of a foreign power, as defined in
2 paragraph (1), (2), or (3) of section 101(a); and

3 “(B) the proposed minimization procedures
4 with respect to such surveillance meet the definition
5 of minimization procedures under section 101(h);
6 if the Attorney General reports such minimization proce-
7 dures and any changes thereto to the Select Committee
8 on Intelligence of the Senate and the Permanent Select
9 Committee on Intelligence of the House of Representatives
10 at least 30 days prior to their effective date, unless the
11 Attorney General determines immediate action is required
12 and notifies the committees immediately of such minimiza-
13 tion procedures and the reason for their becoming effective
14 immediately.

15 “(2) An electronic surveillance authorized by this
16 subsection may be conducted only in accordance with the
17 Attorney General’s certification and the minimization pro-
18 cedures. The Attorney General shall assess compliance
19 with such procedures and shall report such assessments
20 to the Select Committee on Intelligence of the Senate and
21 the Permanent Select Committee on Intelligence of the
22 House of Representatives under section 108(a). If an elec-
23 tronic surveillance authorized by this subsection is di-
24 rected at an agent of a foreign power, the Attorney Gen-
25 eral’s report assessing compliance with the minimization

1 procedures shall also include a statement of the facts and
2 circumstances relied upon to justify the belief that the tar-
3 get of the electronic surveillance is an agent of a foreign
4 power.

5 “(3) The Attorney General shall immediately trans-
6 mit under seal to the court established under section
7 103(a) a copy of any certification under this subsection.
8 Such certification shall be maintained under security
9 measures established by the Chief Justice with the concur-
10 rence of the Attorney General, in consultation with the
11 Director of National Intelligence, and shall remain sealed
12 unless—

13 “(A) an application for a court order with re-
14 spect to the surveillance is made under section 104;
15 or

16 “(B) the certification is necessary to determine
17 the legality of the surveillance under section 106(f).

18 “(b)(1) Notwithstanding any other provision of law,
19 the President, through the Attorney General, may author-
20 ize the acquisition of foreign intelligence information for
21 periods of up to 1 year concerning a person reasonably
22 believed to be outside the United States if the Attorney
23 General certifies in writing under oath that he has deter-
24 mined that—

1 “(A) the acquisition does not constitute elec-
2 tronic surveillance as defined in section 101(f);

3 “(B) the acquisition involves obtaining the for-
4 eign intelligence information from or with the assist-
5 ance of a wire or electronic communications service
6 provider, custodian, or other person (including any
7 officer, employee, agent, or other specified person
8 thereof) who has access to wire or electronic commu-
9 nications, either as they are transmitted or while
10 they are stored, or equipment that is being or may
11 be used to transmit or store such communications;

12 “(C) a significant purpose of the acquisition is
13 to obtain foreign intelligence information; and

14 “(D) the minimization procedures to be em-
15 ployed with respect to such acquisition activity meet
16 the definition of minimization procedures under sec-
17 tion 101(h).

18 “(2) Such certification need not identify the specific
19 facilities, places, premises, or property at which the acqui-
20 sition will be directed.

21 “(3) An acquisition undertaken pursuant to this sub-
22 section may be conducted only in accordance with the At-
23 torney General’s certification and the minimization proce-
24 dures adopted by the Attorney General. The Attorney
25 General shall assess compliance with such procedures and

1 shall report such assessments to the Select Committee on
2 Intelligence of the Senate and the Permanent Select Com-
3 mittee on Intelligence of the House of Representatives
4 under section 108(a).

5 “(4) The Attorney General shall immediately trans-
6 mit under seal to the court established under section
7 103(a) a copy of any certification of the Attorney General
8 under this subsection. Such certification shall be main-
9 tained under security measures established by the Chief
10 Justice with the concurrence of the Attorney General, in
11 consultation with the Director of National Intelligence,
12 and shall remain sealed unless the certification is nec-
13 essary to determine the legality of the acquisition under
14 subsection (o).

15 “(c) With respect to the acquisition authorized under
16 this section, the Attorney General may direct a specified
17 person to—

18 “(1) furnish the government forthwith all infor-
19 mation, facilities, and assistance necessary to accom-
20 plish the acquisition in such a manner as will protect
21 its secrecy and produce a minimum of interference
22 with the services that such person is providing to the
23 target; and

24 “(2) maintain under security procedures ap-
25 proved by the Attorney General and the Director of

1 National Intelligence any records concerning the ac-
2 quisition or the aid furnished that such person wish-
3 es to maintain.

4 “(d) The government shall compensate, at the pre-
5 vailing rate, such specified person for furnishing the aid
6 set forth in subsection (c).

7 “(e) In the case of a failure to comply with a directive
8 issued pursuant to this section, the Attorney General may
9 invoke the aid of the court established under section
10 103(a) to compel compliance with the directive. The court
11 shall issue an order requiring the person or entity to com-
12 ply with the directive forthwith if it finds that the directive
13 was issued in accordance with subsection (a) or (b) and
14 is otherwise lawful. Any failure to obey the order of the
15 court may be punished by the court as contempt thereof.
16 Any process under this section may be served in any judi-
17 cial district in which the person or entity may be found.

18 “(f)(1)(A) A person receiving an Attorney General di-
19 rective issued pursuant to this section may challenge the
20 legality of that directive by filing a petition with the pool
21 established by section 103(e)(1).

22 “(B) The presiding judge shall immediately assign a
23 petition to one of the judges serving in the pool established
24 by section 103(e)(1). Not later than 24 hours after the
25 assignment of such petition, the assigned judge shall con-

1 duct an initial review of the directive. If the assigned judge
2 determines that the petition is frivolous, the assigned
3 judge shall immediately deny the petition and affirm the
4 directive or any part thereof that is the subject of the peti-
5 tion. If the assigned judge determines the petition is not
6 frivolous, the assigned judge shall within 72 hours con-
7 sider the petition in accordance with the procedures estab-
8 lished under section 103(e)(2) and provide a written state-
9 ment for the record of the reasons for any determination
10 under this subsection.

11 “(2) A judge considering a petition to modify or set
12 aside a directive may grant such petition only if the judge
13 finds that such directive does not meet the requirements
14 of this section or is otherwise unlawful. If the judge does
15 not modify or set aside the directive, the judge shall imme-
16 diately affirm such directive, and order the recipient to
17 comply therewith.

18 “(3) Any directive not explicitly modified or set aside
19 consistent with this subsection shall remain in full effect.

20 “(g) A petition for review of a decision under sub-
21 section (f) to affirm, modify, or set aside a directive by
22 the Government or any person receiving such directive
23 shall be made within 7 days of issuance of the decision
24 required by subsection (f) to the court of review estab-
25 lished under section 103(b), which shall have jurisdiction

1 to consider such petitions. The court of review shall pro-
2 vide for the record a written statement of the reasons for
3 its decision and, on petition by the Government or any
4 person receiving such directive for a writ of certiorari, the
5 record shall be transmitted under seal to the Supreme
6 Court of the United States, which shall have jurisdiction
7 to review such decision.

8 “(h) Judicial proceedings under this section shall be
9 concluded as expeditiously as possible. The record of pro-
10 ceedings, including petitions filed, orders granted, and
11 statements of reasons for decision, shall be maintained
12 under security measures established by the Chief Justice
13 of the United States, in consultation with the Attorney
14 General and the Director of National Intelligence.

15 “(i) All petitions under this section shall be filed
16 under seal. In any proceedings under this section, the
17 court shall, upon request of the Government, review ex
18 parte and in camera any Government submission, or por-
19 tions thereof, which may include classified information.

20 “(j) No cause of action shall lie in any court against
21 any provider of a communication service or other person
22 (including any officer, employee, agent, or other specified
23 person thereof) for furnishing any information, facilities,
24 or assistance in accordance with a directive under sub-
25 section (a) or (b).

1 “(k) Information acquired pursuant to an Attorney
2 General authorization under this section concerning any
3 United States person may be used and disclosed by Fed-
4 eral officers and employees without the consent of the
5 United States person only in accordance with the mini-
6 mization procedures required by subsection (a) or (b), as
7 applicable. No otherwise privileged communication ob-
8 tained in accordance with, or in violation of, the provisions
9 of this section shall lose its privileged character. No infor-
10 mation from an acquisition under this section may be used
11 or disclosed by Federal officers or employees except for
12 lawful purposes.

13 “(l) No information acquired pursuant to this section
14 shall be disclosed for law enforcement purposes unless
15 such disclosure is accompanied by a statement that such
16 information, or any information derived therefrom, may
17 only be used in a criminal proceeding with the advance
18 authorization of the Attorney General.

19 “(m) Whenever the Government intends to enter into
20 evidence or otherwise use or disclose in any trial, hearing,
21 or other proceeding in or before any court, department,
22 officer, agency, regulatory body, or other authority of the
23 United States, against an aggrieved person, any informa-
24 tion obtained or derived from an acquisition under this
25 section, the Government shall, prior to the trial, hearing,

1 or other proceeding or at a reasonable time prior to an
2 effort to so disclose or so use that information or submit
3 it in evidence, notify the aggrieved person and the court
4 or other authority in which the information is to be dis-
5 closed or used that the Government intends to so disclose
6 or so use such information.

7 “(n) Whenever any State or political subdivision
8 thereof intends to enter into evidence or otherwise use or
9 disclose in any trial, hearing, or other proceeding in or
10 before any court, department, officer, agency, regulatory
11 body, or other authority of a State or a political subdivi-
12 sion thereof, against an aggrieved person any information
13 obtained or derived from an acquisition under this section,
14 the State or political subdivision thereof shall notify the
15 aggrieved person, the court or other authority in which
16 the information is to be disclosed or used, and the Attor-
17 ney General that the State or political subdivision thereof
18 intends to so disclose or so use such information.

19 “(o) Any person against whom evidence obtained or
20 derived from an acquisition authorized pursuant to this
21 section to which he is an aggrieved person is to be, or
22 has been, introduced or otherwise used or disclosed in any
23 trial, hearing, or other proceeding in or before any court,
24 department, officer, agency, regulatory body, or other au-
25 thority of the United States, a State, or a political subdivi-

1 sion thereof, may move to suppress the evidence obtained
2 or derived from such acquisition on the grounds that—

3 “(1) the information was unlawfully acquired;

4 or

5 “(2) the acquisition was not made in conformity
6 with an order of authorization or approval.

7 Such a motion shall be made before the trial, hearing, or
8 other proceeding unless there was no opportunity to make
9 such a motion or the person was not aware of the grounds
10 of the motion.

11 “(p) Whenever a court or other authority is notified
12 pursuant to subsection (m) or (n), whenever a motion is
13 made pursuant to subsection (o), or whenever any motion
14 or request is made by an aggrieved person pursuant to
15 any other statute or rule of the United States or any State
16 before any court or other authority of the United States
17 or any State to discover or obtain an Attorney General
18 directive or other materials relating to the acquisition au-
19 thorized under this section or to discover, obtain, or sup-
20 press evidence or information obtained or derived from the
21 acquisition authorized under this section, the United
22 States district court or, where the motion is made before
23 another authority, the United States district court in the
24 same district as the authority, shall, notwithstanding any
25 other law, if the Attorney General files an affidavit under

1 oath that disclosure or an adversary hearing would harm
2 the national security of the United States, review in cam-
3 era and ex parte the directive, and such other materials
4 relating to the acquisition as may be necessary to deter-
5 mine whether the acquisition authorized under this section
6 was lawfully authorized and conducted. In making this de-
7 termination, the court may disclose to the aggrieved per-
8 son, under appropriate security procedures and protective
9 orders, portions of the directive or other materials relating
10 to the acquisition only where such disclosure is necessary
11 to make an accurate determination of the legality of the
12 acquisition.

13 “(q) If the United States district court pursuant to
14 subsection (o) determines that the acquisition authorized
15 under this section was not lawfully authorized or con-
16 ducted, it shall, in accordance with the requirements of
17 law, suppress the evidence which was unlawfully obtained
18 or derived or otherwise grant the motion of the aggrieved
19 person. If the court determines that such acquisition was
20 lawfully authorized and conducted, it shall deny the mo-
21 tion of the aggrieved person except to the extent that due
22 process requires discovery or disclosure.

23 “(r) Orders granting motions or requests under sub-
24 section (o), decisions under this section that an acquisition
25 was not lawfully authorized or conducted, and orders of

1 the United States district court requiring review or grant-
2 ing disclosure of directives or other materials relating to
3 such acquisition shall be final orders and binding upon
4 all courts of the United States and the several States ex-
5 cept a United States court of appeals and the Supreme
6 Court.

7 “(s) Federal officers who acquire foreign intelligence
8 information under this section may consult with Federal
9 law enforcement officers or law enforcement personnel of
10 a State or political subdivision of a State (including the
11 chief executive officer of that State or political subdivision
12 who has the authority to appoint or direct the chief law
13 enforcement officer of that State or political subdivision)
14 to coordinate efforts to investigate or protect against—

15 “(1) actual or potential attack or other grave
16 hostile acts of a foreign power or an agent of a for-
17 eign power;

18 “(2) sabotage, international terrorism, or the
19 development or proliferation of weapons of mass de-
20 struction by a foreign power or an agent of a foreign
21 power; or

22 “(3) clandestine intelligence activities by an in-
23 telligence service or network of a foreign power or by
24 an agent of a foreign power.

1 “(t) Coordination authorized by subsection (s) shall
2 not preclude the certification required by subsection (a)
3 or (b), as applicable.

4 “(u) RETENTION OF DIRECTIVES AND ORDERS.—Di-
5 rectives made and orders granted under this section shall
6 be retained for a period of at least 10 years from the date
7 when they were made.”.

8 (d) DESIGNATION OF JUDGES.—Section 103 of FISA
9 (50 U.S.C. 1803) is amended—

10 (1) in subsection (a), by inserting, “at least”
11 before “seven of the United States judicial circuits”;
12 and

13 (2) at the end by adding the following new sub-
14 section:

15 “(g) Applications for a court order under this title
16 are authorized if the President has, by written authoriza-
17 tion, empowered the Attorney General to approve applica-
18 tions to the court having jurisdiction under this section,
19 and a judge to whom an application is made may, notwith-
20 standing any other law, grant an order, in conformity with
21 section 105, approving electronic surveillance of a foreign
22 power or an agent of a foreign power for the purpose of
23 obtaining foreign intelligence information.”.

24 (e) APPLICATIONS FOR COURT ORDERS.—Section
25 104 of FISA (50 U.S.C. 1804) is amended—

1 (1) in subsection (a), by striking paragraphs
2 (6) through (11) and inserting the following:

3 “(6) a certification or certifications by the As-
4 sistant to the President for National Security Af-
5 fairs or an executive branch official authorized by
6 the President to conduct electronic surveillance for
7 foreign intelligence purposes—

8 “(A) that the certifying official deems the
9 information sought to be foreign intelligence in-
10 formation;

11 “(B) that a significant purpose of the sur-
12 veillance is to obtain foreign intelligence infor-
13 mation;

14 “(C) that such information cannot reason-
15 ably be obtained by normal investigative tech-
16 niques; and

17 “(D) including a statement of the basis for
18 the certification that—

19 “(i) the information sought is the type
20 of foreign intelligence information des-
21 ignated; and

22 “(ii) such information cannot reason-
23 ably be obtained by normal investigative
24 techniques;

1 “(7) a statement of the period of time for which
2 the electronic surveillance is required to be main-
3 tained, and if the nature of the intelligence gath-
4 ering is such that the approval of the use of elec-
5 tronic surveillance under this title should not auto-
6 matically terminate when the described type of infor-
7 mation has first been obtained, a description of facts
8 supporting the belief that additional information of
9 the same type will be obtained thereafter;

10 “(8) a summary description of the nature of the
11 information sought and the type of communications
12 or activities to be subject to the surveillance;

13 “(9) a summary statement of the facts con-
14 cerning all previous applications that have been
15 made to any judge under this title involving any of
16 the persons, facilities, or places specified in the ap-
17 plication, and the action taken on each previous ap-
18 plication; and

19 “(10) a summary statement of the means by
20 which the surveillance will be effected and a state-
21 ment whether physical entry is required to effect the
22 surveillance.”;

23 (2) by striking subsection (b);

24 (3) by redesignating subsections (c) through (e)
25 as subsections (b) through (d), respectively; and

1 (4) in subsection (d)(1)(A), as redesignated by
2 paragraph (3), by inserting after “Secretary of
3 State” inserting “Director of the Central Intel-
4 ligence Agency”.

5 (f) ISSUANCE OF ORDER.—Section 105 of FISA (50
6 U.S.C. 1805) is amended—

7 (1) in subsection (a), by—

8 (A) striking paragraph (1); and

9 (B) redesignating paragraphs (2) through
10 (5) as paragraphs (1) through (4), respectively;
11 (2) by striking paragraph (1) of subsection (c)
12 and inserting the following:

13 “(1) An order approving an electronic surveil-
14 lance under this section shall specify—

15 “(A) the identity, if known, or a descrip-
16 tion of the target of the electronic surveillance
17 identified or described in the application pursu-
18 ant to section 104(a)(3);

19 “(B) the nature and location of each of the
20 facilities or places at which the electronic sur-
21 veillance will be directed, if known;

22 “(C) the period of time during which the
23 electronic surveillance is approved;

1 “(D) the type of information sought to be
2 acquired and the type of communications or ac-
3 tivities to be subjected to the surveillance; and

4 “(E) the means by which the electronic
5 surveillance will be effected and whether phys-
6 ical entry will be used to effect the surveil-
7 lance.”;

8 (3) by striking subsection (d) and inserting the
9 following:

10 “(d) Each order under this section shall specify the
11 type of electronic surveillance involved, including whether
12 physical entry is required.”;

13 (4) by striking paragraph (2) of subsection (e)
14 and inserting the following:

15 “(2) Extensions of an order issued under this title
16 may be granted on the same basis as an original order
17 upon an application for an extension and new findings
18 made in the same manner as required for an original order
19 and may be for a period not longer than the court deter-
20 mines to be reasonable or 1 year, whichever is less.”;

21 (5) by striking subsection (f) and inserting the
22 following:

23 “(f)(1) Notwithstanding any other provision of this
24 title, when an executive branch officer appointed by the
25 President with the advice and consent of the Senate who

1 is authorized by the President to conduct electronic sur-
2 veillance reasonably determines that—

3 “(A) an emergency situation exists with respect
4 to the employment of electronic surveillance to ob-
5 tain foreign intelligence information before an order
6 authorizing such surveillance can with due diligence
7 be obtained; and

8 “(B) the factual basis for issuance of an order
9 under this title to approve such surveillance exists;
10 that official may authorize the emergency employment of
11 electronic surveillance in accordance with paragraph (2).

12 “(2) Under paragraph (1), the following require-
13 ments shall be satisfied:

14 “(A) The Attorney General shall be informed of
15 the emergency electronic surveillance.

16 “(B) A judge having jurisdiction under section
17 103 shall be informed by the Attorney General or
18 his designee as soon as practicable following such
19 authorization that the decision has been made to
20 employ emergency electronic surveillance.

21 “(C) An application in accordance with this
22 title shall be made to that judge or another judge
23 having jurisdiction under section 103 as soon as
24 practicable, but not more than 7 days after such
25 surveillance is authorized. In the absence of a judi-

1 cial order approving such electronic surveillance, the
2 surveillance shall terminate when the information
3 sought is obtained, when the application for the
4 order is denied, or after the expiration of 7 days
5 from the time of emergency authorization, whichever
6 is earliest. In the event that such application for ap-
7 proval is denied, or in any other case where the elec-
8 tronic surveillance is terminated and no order is
9 issued approving the surveillance, no information ob-
10 tained or evidence derived from such surveillance
11 shall be received in evidence or otherwise disclosed
12 in any trial, hearing, or other proceeding in or be-
13 fore any court, grand jury, department, office, agen-
14 cy, regulatory body, legislative committee, or other
15 authority of the United States, a State, or political
16 subdivision thereof, and no information concerning
17 any United States person acquired from such sur-
18 veillance shall subsequently be used or disclosed in
19 any other manner by Federal officers or employees
20 without the consent of such person, except with the
21 approval of the Attorney General if the information
22 indicates a threat of death or serious bodily harm to
23 any person. A denial of the application made under
24 this subsection may be reviewed as provided in sec-
25 tion 103.

1 “(D) The official authorizing the emergency
2 employment of electronic surveillance shall require
3 that the minimization procedures required by this
4 title for the issuance of a judicial order be fol-
5 lowed.”; and

6 (6) in subsection (i)—

7 (A) by striking “a wire or” and inserting
8 “any”;

9 (B) by striking “chapter” and inserting
10 “title”; and

11 (C) by adding at the end “, or in response
12 to certification by the Attorney General or his
13 designee seeking information, facilities, or tech-
14 nical assistance from such person under section
15 102 of this title”.

16 (g) USE OF INFORMATION.—Section 106 of FISA
17 (50 U.S.C. 1806) is amended—

18 (1) in subsection (i)—

19 (A) by striking “radio”; and

20 (B) by inserting “contain foreign intel-
21 ligence information or” after “the Attorney
22 General determines that the contents” inserting
23 “contain foreign intelligence information or”;
24 and

1 (2) in subsection (k), by striking “1804(a)(7)”
2 and inserting “104(a)(6)”.

3 (h) CONGRESSIONAL OVERSIGHT.—Section 108 of
4 FISA (50 U.S.C. 1808) is amended by adding at the end
5 the following:

6 “(c) DOCUMENT MANAGEMENT SYSTEM FOR APPLI-
7 CATIONS FOR ORDERS APPROVING ELECTRONIC SURVEIL-
8 LANCE.—

9 “(1) SYSTEM PROPOSED.—The Attorney Gen-
10 eral and Director of National Intelligence shall, in
11 consultation with the Director of the Federal Bu-
12 reau of Investigation, the Director of the National
13 Security Agency, the Director of the Central Intel-
14 ligence Agency, and the court established under sec-
15 tion 103(b), conduct a feasibility study to develop
16 and implement a secure, classified document man-
17 agement system that permits the prompt prepara-
18 tion, modification, and review by appropriate per-
19 sonnel of the Department of Justice, the Federal
20 Bureau of Investigation, the National Security
21 Agency, and other applicable elements of the United
22 States Government of applications under section 104
23 before their submittal to that court.

24 “(2) SCOPE OF SYSTEM.—The document man-
25 agement system proposed in paragraph (1) shall—

“(A) permit and facilitate the prompt submittal of applications and all other matters, including electronic filings, to the court established under section 103(b) under section 104 or 105(g)(5); and

“(B) permit and facilitate the prompt transmittal of rulings of that court to personnel submitting applications described in paragraph (1).”.

(i) AMENDMENTS TO FISA TITLE I RELATING TO WEAPONS OF MASS DESTRUCTION.—

(1) Section 101 of FISA, as amended by subsection (b) of this section, is further amended—

(A) in subsection (b)(1)—

(i) by striking “or” at the end of subparagraph (D);

(ii) by redesignating subparagraph (E) as subparagraph (F); and

(iii) by inserting after subparagraph (D) the following new subparagraph (E):

“(E) engages in the development or proliferation of weapons of mass destruction, or activities in preparation therefor; or;”;

(B) in subsection (b)(2)(C), by striking “sabotage or international terrorism” and in-

1 serting “sabotage, international terrorism, or
2 the development or proliferation of weapons of
3 mass destruction”; and

4 (C) by inserting after subsection (k) the
5 following new subsection (l):

6 “(l) ‘Weapon of mass destruction’ means—

7 “(1) any destructive device (as that term is de-
8 fined in section 921 of title 18, United States Code)
9 that is intended or has the capability, to cause death
10 or serious bodily injury to a significant number of
11 people;

12 “(2) any weapon that is designed or intended to
13 cause death or serious bodily injury through the re-
14 lease, dissemination, or impact of toxic or poisonous
15 chemicals, or their precursors;

16 “(3) any weapon involving a biological agent,
17 toxin, or vector (as those terms are defined in sec-
18 tion 178 of title 18, United States Code); or

19 “(4) any weapon that is designed to release ra-
20 diation or radioactivity at a level dangerous to
21 human life.”.

22 (2) Sections 101(e)(1)(B), 106(k)(1)(B), and
23 305(k)(1)(B) of FISA are each amended by striking
24 “sabotage or international terrorism” and inserting
25 “sabotage, international terrorism, or the develop-

1 ment or proliferation of weapons of mass destruc-
2 tion”.

3 (j) CONFORMING AMENDMENTS TO TITLES I AND III
4 OF FISA TO ACCOMMODATE INTERNATIONAL MOVEMENTS
5 OF TARGETS.—

6 (1) Section 105(e) of FISA is amended by add-
7 ing at the end the following new paragraph:

8 “(4) An order issued under this section shall remain
9 in force during the authorized period of surveillance not-
10 withstanding the absence of the target from the United
11 States, unless the Government files a motion to extinguish
12 the order and the court grants the motion.”.

13 (2) Section 304(d) of FISA is amended by add-
14 ing at the end the following new paragraph:

15 “(4) An order issued under this section shall remain
16 in force during the authorized period of physical search
17 notwithstanding the absence of the target from the United
18 States, unless the Government files a motion to extinguish
19 the order and the court grants the motion.”.

20 **SEC. 210. CONFORMING AMENDMENT TO TABLE OF CON-**
21 **TENTS.**

22 The table of contents for the Foreign Intelligence
23 Surveillance Act of 1978 is amended—

24 (1) by striking the item relating to section 102
25 and inserting the following new item:

“Sec. 102. Electronic surveillance authorization without court order; certification by attorney general; reports to congressional committees; transmittal under seal; duties and compensation of communication common carrier; applications; jurisdiction of court.”;

1 (2) by striking the items relating to sections
2 111, 309, and 404; and

3 (3) by striking the items related to title VII and
4 section 701 and inserting the following:

“TITLE VII—ELECTRONIC SURVEILLANCE PROGRAMS

“Sec. 701. Definitions.

“Sec. 702. Foreign intelligence surveillance court jurisdiction to review electronic surveillance programs.

“Sec. 703. Applications for approval of electronic surveillance programs.

“Sec. 704. Approval of electronic surveillance programs.

“Sec. 705. Congressional oversight.

“TITLE VIII—EFFECTIVE DATE

“Sec. 801. Effective date.”.

Calendar No. 633

109TH CONGRESS
2^D Session

S. 3929

A BILL

To authorize military commissions to bring terrorists to justice, to strengthen and modernize terrorist surveillance capabilities, and for other purposes.

SEPTEMBER 25, 2006

Read the second time and placed on the calendar